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In The
# Supreme Court of the United States

ANTHONY ASH and JOHN HITHON,

*Petitioners,*

v.

TYSON FOODS, INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

(1) In *Ash v. Tyson Foods, Inc.*, 126 Sup. Ct. 1195 (2006), this Court noted that the courts of appeals "have articulated various . . . standards" regarding when a plaintiff may support a claim of employment discrimination by adducing evidence that he or she was better qualified than the individual selected for a disputed position. The question presented is the issue expressly left unresolved by *Ash*: "what standard should govern pretext claims based on superior qualifications[?]" 126 Sup. Ct. at 1197.

(2) How and by whom should evidence of racist remarks be evaluated in a case alleging racial discrimination?

## PARTIES

The parties to this action are set forth in the caption.

TABLE OF CONTENTS

Page

Questions Presented ..... i

Parties ..... ii

Opinions Below ..... 1

Statement of Jurisdiction ..... 2

Statutes Involved ..... 2

Statement of the Case ..... 3

I. There Is A Widespread Conflict Among The Circuit Courts Regarding When, Or Indeed Whether, Evidence Regarding Comparative Qualifications Can Be Utilized To Prove Invidious Discrimination In Employment ..... 10

II. The Decision Of The Eleventh Circuit Conflicts With Decisions Of This Court And Of Numerous Courts Of Appeals Regarding The Evaluation Of Biased Remarks In Discrimination Cases ..... 23

Conclusion ..... 30

APPENDIX

Opinion of the Court of Appeals, August 2, 2006 ..... 1a

Opinion of the Court of Appeals, April 19, 2005 ..... 9a

Memorandum Opinion of the District Court, March 26, 2004 ..... 22a

Order of the District Court, May 18, 2004 ..... 42a

Order of the Court of Appeals, October 2, 2006 ..... 43a

District Court Decisions in the Eleventh Circuit Applying the "No Reasonable Person" Standard ..... 45a

TABLE OF CONTENTS – Continued

Page

District Court Decisions in the Fifth Circuit Applying the "No Reasonable Person" Standard ..... 47a

District Court Decisions in the Seventh Circuit Applying the "No Reasonable Person" Standard..... 49a

# TABLE OF AUTHORITIES

Page

CASES

*Aka and Lathram v. Snow,* 336 F.3d 1085 (D.C.Cir. 2003) ..... 20

*Aka v. Washington Hosp. Center,* 156 F.3d 1284 (D.C. Cir. 1998) ..... 20

*Alexander v. Fulton County, Georgia,* 207 F.3d 1303 (11th Cir. 2000) ..... 12, 13

*Anderson v. City of Bessemer City,* 470 U.S. 564 (1985) ..... 25, 28, 29, 30

*Ash v. Tyson Foods, Inc.,* 126 S. Ct. 1195, ___ U.S. ___ (2006) ..... *passim*

*Barnes v. United States Department of the Navy,* 95 Fed. Appx. 46 (5th Cir. 2004) ..... 16

*Bernales v. Cook,* 37 Fed. Appx. 792 (7th Cir. 2002) ..... 22

*Bray v. Marriott Hotels,* 110 F.3d 986 (3d Cir. 1997) ..... 21

*Brooks v. County Commission of Jefferson County,* Ala., 446 F.3d 1160 (11th Cir. 2006) ..... 12, 13

*Carberry v. Monarch Marking Systems, Inc.,* 30 Fed. Appx. 389 (6th Cir. 2002) ..... 19

*Cardova v. State Farm Ins. Companies,* 124 F.3d 1145 (9th Cir. 1997) ..... 27

*Carter v. George Washington University,* 387 F.3d 872 (D.C.Cir. 2004) ..... 20

*Celestine v. Petroleos de Venezuela,* 266 F.3d 343 (5th Cir. 2001) ..... 16

*Chuang v. University of California Davis, Bd. of Trustees,* 225 F.3d 1115 (9th Cir. 2000) ..... 27

TABLE OF AUTHORITIES – Continued

Page

*Chustz v. City of New Orleans,* 2002 WL 31556353 (E.D.La. Nov. 15, 2002) ..... 16

*Cichon v. Exelon Generation Co., L.L.C.*, 401 F.3d 803 (7th Cir. 2005) ..... 22

*Cook v. Mississippi Dept. of Human Services,* 108 Fed. Appx. 852 (5th Cir. 2004) ..... 16

*Cooper v. Southern Co.,* 390 F.3d 695 (11th Cir. 2004) ..... 8, 12

*Cornwell v. Electra Central Credit Union,* 439 F.3d 1018 (9th Cir. 2006) ..... 16

*Dancy-Pratt v. The School Board of Miami-Dade County,* 2001 WL 1922063 (S.D.Fla. Dec. 13, 2001) ..... 13

*David v. Caterpillar, Inc.*, 324 F.3d 851 (7th Cir. 2003) ..... 22

*Deines v. Texas Department of Protective and Regulatory Services,* 164 F.3d 277 (5th Cir. 1999) ..... 15

*Dennis v. Columbia Colleton Medical Center, Inc.*, 290 F.3d 639 (4th Cir. 2002) ..... 20, 21

*Dorrego v. Public Health Trust of Miami Dade County,* 293 F. Supp. 2d 1274 (S.D. Fla. 2003) ..... 13

*EEOC v. Heartway Corp.,* 2006 WL 3030562 (10th Cir. Oct. 26, 2006) ..... 29

*Evans v. City of Bishop,* 238 F.3d 586 (5th Cir. 2000) ..... 27

*Farrell v. Butler University,* 421 F.3d 609 (7th Cir. 2005) ..... 22

*Glenn's Trucking Co. v. NLRB,* 298 F.3d 502 (6th Cir. 2002) ..... 20

TABLE OF AUTHORITIES – Continued

Page

*Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217 (9th Cir. 1998) ..... 18

*Green v. City of New York*, 2006 WL 2846473 (2d Cir. Oct. 5, 2006) ..... 13

*Green v. Miami-Dade County*, 2003 WL 22331877 (S.D.Fla. Sept. 9, 2003) ..... 29

*Haas v. Betz Laboratories, Inc.*, 1999 WL 451206 (9th Cir. June 23, 1999) ..... 17

*Harrington v. The Children's Psychiatric Center*, 2003 WL 23356396 (S.D.Fla. Dec. 9, 2006) ..... 13

*Harvey v. Office of Banks and Real Estate*, 377 F.3d 698 (7th Cir. 2004) ..... 22

*Heiko v. Colombo Savings Bank, F.S.B.*, 434 F.3d 249 (4th Cir. 2006) ..... 21

*Higgins v. Tyson Foods, Inc.*, 2006 WL 2466178 (11th Cir. Aug. 28, 2006) ..... 11, 12, 14

*Hithon v. Tyson Foods, Inc.*, 144 Fed. Appx. 795 (11th Cir. 2005) ..... 12, 14

*Hooker v. Victoria's Secret Stores, Inc.*, 2001 WL 1692436 (5th Cir. Nov. 21, 2001) ..... 26

*Hubbard v. M & H Valve Co.*, 2006 WL 1410147 (11th Cir. May 22, 2006) ..... 12

*Humphrey v. Potter*, 162 F. Supp. 2d 1354 (S.D.Fla. 2001) ..... 13

*Jenkins v. Nashville Public Radio*, 106 Fed. Appx. 991 (6th Cir. 2004) ..... 19

*Jordan v. City of Gary, Indiana*, 396 F.3d 825 (7th Cir. 2005) ..... 22

TABLE OF AUTHORITIES – Continued

Page

*King v. Healthrider, Inc.*, 1999 WL 825122 (6th Cir. Oct. 8, 1999) ..... 19

*Kozlowski v. Fry*, 238 F. Supp. 2d 966 (N.D.Ill. 2002) ..... 22

*Lall v. Perot Systems Corp.*, 2004 WL 884438 (W.D.Tex. April 23, 2004) ..... 16

*Lee v. GTE Florida, Inc.*, 226 F.3d 1249 (11th Cir. 2000) ..... 7, 12, 13

*Lindahl v. Air France*, 930 F.2d 1434 (9th Cir. 1991) ..... 18

*Lust v. Sealy, Inc.*, 277 F. Supp. 2d 973 (W.D.Wis. 2003) ..... 22

*Margolis v. Tektronix, Inc.*, 44 Fed. Appx. 138 (9th Cir. 2002) ..... 17

*Millbrook v. IBP, Inc.*, 280 F.3d 1169 (7th Cir. 2002) ..... 22

*Milledge v. Rayonier, Inc.*, 2006 WL 2257949 (11th Cir. Aug. 8, 2006) ..... 12, 14

*Mlynczak v. Bodman*, 442 F.3d 1050 (7th Cir. 2006) ..... 22

*Odima v. Westin Tucson Hotel*, 53 F.3d 1484 (9th Cir. 1995) ..... 16

*Odima v. Westin Tucson Hotel Co.*, 991 F.2d 585 (9th Cir. 1993) ..... 18, 19

*Palasota v. Haggar Clothing Co.*, 342 F.3d 569 (5th Cir. 2003) ..... 26

*Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) ..... 14

*Phelan v. Cook County*, 463 F.3d 773 (7th Cir. 2006) ..... 29

*Plotke v. White*, 405 F.3d 1092 (10th Cir. 2005) ..... 26

TABLE OF AUTHORITIES – Continued

Page

*Raad v. Fairbanks North Star Borough School District,* 323 F.3d 1185 (9th Cir. 2003) ..... 16

*Reed v. Lawrence Chevrolet, Inc.*, 108 F.3d 393 (7th Cir. 2004) ..... 22

*Reed v. Manteno School Dist. No. 5,* 59 Fed. Appx. 868 (7th Cir. 2003) ..... 22

*Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) ..... 25, 26, 27, 30

*Reynolds v. City of Dallas,* 2004 WL 893425 (N.D.Tex. April 23, 2004) ..... 15

*Rogers-Libert v. Miami-Dade County,* 184 F. Supp. 2d 1273 (S.D.Fla. 2001) ..... 13

*Roy v. United States Department of Agriculture,* 115 Fed. Appx. 198 (5th Cir. 2004) ..... 15, 16

*Runnels v. Texas Children's Hospital Select Plan,* 167 Fed. Appx. 377 (5th Cir. 2006) ..... 15, 16

*Russell v. McKinney Hospital Venture,* 235 F.3d 219 (5th Cir. 2000) ..... 26

*Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990) ..... 29

*Siegel v. Alpha Wire Corp.*, 894 F.2d 50 (3d Cir. 1990) ..... 29

*Stewart v. Ashcroft,* 352 F.3d 422 (D.C.Cir. 2003) ..... 21

*Sublett v. John Wiley & Sons, Inc.*, 2006 WL 2613509 (7th Cir. Sept. 13, 2006) ..... 22

*Taylor v. Roche,* 2006 WL 2613659 (11th Cir. Sept. 12, 2006) ..... 11, 13

*Taylor v. Williams,* 2000 WL 1844698 (S.D.Ala Oct. 30, 2000) ..... 13

TABLE OF AUTHORITIES – Continued

Page

*Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) ..... 14, 19

*Thanonsingh v. Board of Educ.*, 462 F.3d 762 (7th Cir. 2006) ..... 29

*Thomas v. California State Department of Corrections*, 1992 WL 197414 (9th Cir. Aug. 18, 1992) ..... 18

*Tippier v. Spacelabs Medical, Inc.*, 2006 WL 1130809 (11th Cir. April 27, 2006) ..... 12

*Tucevich v. State of Nevada*, 1999 WL 62735 (9th Cir. Jan. 22, 1999) ..... 16, 18

*Twilley v. Burlington Northern, etc. Rwy. Co.*, 351 F. Supp. 2d 1299 (N.D.Ala. 2004) ..... 13

*Watkins v. Huntsville, Ala.*, 176 Fed. Appx. 955 (11th Cir. 2006) ..... 12

*Wright v. Columbia Women & Children's Hospital*, 2002 WL 495325 ..... 16

*Zambetti v. Cuyahoga Community College*, 314 F.3d 249 (6th Cir. 2002) ..... 19

STATUTES

28 U.S.C. § 1254(1) ..... 2

42 U.S.C. § 1981 ..... 11

42 U.S.C. § 2000e-2(a)(1) ..... 2

## PETITION FOR A WRIT OF CERTIORARI

Petitioners Anthony Ash and John Hithon[1] respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on August 2, 2006.

## OPINIONS BELOW

The August 2, 2006 opinion of the court of appeals, which is not officially reported, is unofficially reported at 2006 WL 2219749, and is set out at pp. 1a-8a of the Appendix. The October 2, 2006 order of the court of appeals denying rehearing, which is not officially reported, is set out at pp. 43a-44a.

The April 19, 2005 opinion of the court of appeals, which is reported at 129 Fed. Appx. 529, is set out at pp.

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[1] Resolution of the questions presented in this case would affect petitioners in different ways.

The courts below, based on their views of the two questions presented, concluded that the jury's finding of racial discrimination against petitioner Ash should be set aside, and judgment entered in favor of Tyson. A decision by this Court in favor of Ash on either of those issues would require that that decision to award judgment as a matter of law be either reversed or vacated.

The court of appeals overturned the judgment as a matter of law against petitioner Hithon, but upheld the district court's decision to order a new trial. The district court's new trial order was based on its conclusion that the jury's finding of discrimination against Hithon was "against the great weight of the evidence." (42a). That new trial order itself contained no analysis of the evidence in this case; it necessarily was colored by the trial judge's conclusion, set forth only two months earlier, that much of the evidence offered by Hithon could not as a matter of law support a finding of discrimination. A decision by this Court in favor of Hithon regarding the issues presented in this petition would require that the trial judge reconsider his decision regarding whether the jury verdict was against the great weight of the evidence.

9a-21a. The March 26, 2004 memorandum decision of the district court, which is not officially reported, is set out at pp. 22a-41a. The May 18, 2004 order of the district court, which is not officially reported, is set out at p. 42a.

## STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on August 2, 2006. A timely petition for rehearing was denied on October 2, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Section 703(a)(1) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Section 1981 of 42 U.S.C. provides in pertinent part:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . .
>
> (b) For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

## STATEMENT OF THE CASE

In February 2006 this Court granted certiorari in the instant case and overturned per curiam several aspects of the Eleventh Circuit's 2005 opinion. On remand, the Eleventh Circuit reinstated the holding that had been vacated by this Court. This petition seeks resolution of several inter-circuit conflicts that persist despite this Court's 2006 decision.

This litigation concerns two promotions that were made in the summer of 1995 to the position of shift manager at a Gadsden, Alabama plant of Tyson Foods. The plant processes chickens. At the time petitioners Ash and Hithon, both African-American men, were unit managers at the plant, the position immediately below shift manager. The shift manager vacancies at issue were both filled by whites with far less experience at Tyson, or with chicken processing, than Ash and Hithon.

A jury found that Tyson was guilty of racial discrimination against both Ash and Hithon, and awarded each plaintiff $250,000 in compensatory damages and $1.5 million in punitive damages. At trial the parties offered sharply conflicting evidence on a wide range of factual issues. The questions presented by this petition, concern the legal standards to be applied in resolving those disputed issues. Two aspects of the trial record are material here.

First, it was undisputed that on several occasions Thomas Hatley, the white plant manager who made the promotion decisions, addressed Ash and Hithon as "boy." (34a). On one of those occasions Ash's wife was present and objected to the remark, pointing out that her husband was an adult; in response, "Hatley laughed." (*Id.*). Tyson filed an in limine motion to bar admission of this evidence,

objecting in part that it there would be "undue prejudice" if the jury learned what Hatley had said.[2] Tyson also requested an instruction limiting jury consideration of these remarks. The district court denied the in limine motion and refused to give the requested instruction. Hatley's action in addressing Ash and Hithon as "boy" was a major issue at trial. In their closing arguments, counsel for plaintiffs[3] and defendant[4] discussed and disagreed about the significance of Hatley's actions in addressing Ash and Hithon as "boy."

Second, both parties offered substantial evidence regarding whether the white individuals who received the

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[2] Defendant's Motion in Limine Regarding "Stray Remarks" As To Plaintiffs Anthony Ash and John Hithon, p. 2.

[3] Tr. 571-72 ("[W]e all know that is a term meant to be deprecating or a put down to a black man. We all know that. We're southerners. . . . I suggest to you that that remark shows a reflection of [Hatley's] thinking and Tyson's thinking.")

[4] Tyson's attorney insisted that the word "boy" "wasn't delivered with that level of venom and hostility that [plaintiff's witnesses] delivered it on the witness stand." (Tr. 612). If the word "boy" had been used in that tone of voice, he urged, Ash and Hithon would surely have complained to the plant personnel section. (Tr. 613). Of course, since Hatley was the plant manager, the staff in the personnel section were his subordinates.

Defense counsel also acknowledged that the term "boy" could have a racist meaning when used as a form of address to a African-American man:

> I know they were said, and I have to deal with them, because I grew up in Anniston in the 1950's, and I know what that comment means. . . . [W]hen I was in high school, that . . . was fighting words . . . [I]f Hatley said it the way it was said on that witness stand by those witnessed, you know, back when I was growing up, there would probably he a little trouble. And that was a mean thing to say, and I would not defend that.

(Tr. 611).

disputed promotions were less qualified than Ash and Hithon. Plaintiffs offered evidence tending to show that under Tyson's own written standards the two whites were far less qualified than Ash and Hithon, and that one or both of the whites did not even meet the minimum requirements for the job.

Plaintiffs introduced a company "job summary" which stated that three to five years of experience with Tyson was among the "requirements" for the job of shift manager;[5] one of the whites promoted, Steve Dade, had worked for Tyson for less than two years. A separate Tyson "Personnel Policy" indicated that when filling vacancies, priority consideration should be given to Tyson workers in the complex or department in which that vacancy existed.[6] Although Ash and Hithon were in the same plant as the two shift manager positions, the other white promoted, Randy King, was not from the Gadsden plant or the complex of which it was a part. Third, another Tyson "Personnel Policy" offered into evidence stated that promotion was among the "benefits and rights for team members who establish seniority with the company."[7] Ash and Hithon had fifteen and thirteen years, respectively, of seniority with Tyson, compared to less than two years for Dade.

Tyson offered two types of evidence to respond to the contention that Ash and Hithon were more qualified under the company's own standards. First, the defendant offered testimony by Hatley, the plant manager who made the disputed promotion decisions, that he simply did not know

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[5] Plaintiffs' Exhibit 2.

[6] Plaintiffs' Exhibit 10 p. 8.

[7] Plaintiffs' Exhibit 9.

about these written Tyson personnel and promotion standards.[8] Second, Tyson disputed the meaning of the written standards in question. For example, although the job summary stated that three to five years experience was a "requiremen[t]," a defense witness testified that that amount of experience was merely "suggested."[9]

In addition, Tyson offered evidence that a primary criterion that was used to determine the individual to receive each promotion was whether he or she did *not* work at the Gadsden plant, and thus could bring a fresh approach and prospective.[10] Application of that criterion would have favored the two whites actually selected. Hatley explained that he used that standard – rather than experience or seniority or work in the same department – because the Gadsden plant was assertedly losing money, and was at risk of being closed by Tyson.[11] Plaintiffs contended that this ad hoc standard had been fashioned simply to rationalize promoting two less qualified whites; plaintiffs offered evidence that the Gadsden plant was not actually losing money, and that one of the whites selected had come from a Tyson plant that had been closed because it was not profitable.[12]

Much of the closing argument at trial was devoted to these disputes regarding whether the whites who were promoted were, under Tyson's own standards, far less

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[8] Tr. 355-56, 536, 539.

[9] Tr. 607.

[10] Tr. 436, 445, 446.

[11] Tr. 439-40.

[12] Tr. 449.

qualified than Ash and Hithon.[13] The jury was properly instructed that it could not find Tyson liable merely because the promotion decisions "were stupid decisions or bad decisions," but only if those decisions had been motivated by racial discrimination.[14]

Following the jury verdict for plaintiffs, Tyson moved for judgment as a matter of law. The district court concluded as a matter of law that much of the evidence offered by plaintiffs could not be relied on to support the jury's finding of intentional discrimination. First, applying Eleventh Circuit precedent, the trial judge held that plaintiffs could not rely on evidence that they were better qualified than the promoted whites, unless that evidence was so extraordinary it "jump[s] off the page and slap[s you] in the face." (31a) (*quoting Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1254 (11th Cir. 2000)). Even if the plaintiffs were more qualified than the whites who received the disputed promotions, the court held, any disparity was not great enough to meet that demanding standard. (33a). Second, the judge concluded that Hatley's use of the term "boy" was not "racial in nature." (34a). The judge also ruled, in the alternative, that Tyson was entitled to a new trial, in part because "the jury's verdict of discrimination is against the great weight of the evidence." (42a).

In its 2005 decision, the Eleventh Circuit upheld the trial judge's conclusion that as a matter of law neither the evidence regarding qualifications and nor the evidence regarding Hatley's actions in calling Ash and Hithon "boy" could support the jury's finding of discrimination. The

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[13] Transcript, pp. 560, 573-74, 576-85, 589, 603-04, 605-07, 617, 622.

[14] Transcript, p. 636.

court of appeals held that evidence that Ash and Hithon were more qualified could not be relied on to show an employer's reasons were a pretext for discrimination, unless the disparities in qualifications were so great that they "virtually jump off the page and slap you in the face." 15a (*quoting Cooper v. Southern Co.*, 390 F.3d 695, 732 (11th Cir. 2004)). The court of appeals also held that as a matter of law Hatley's use of the term "boy" when addressing Ash and Hithon was not evidence of discrimination; only use of the phrase "black boy," the court insisted, could support a finding of discrimination. (14a).

The court of appeals upheld the decision of the district court to award judgment as a matter of law dismissing Ash's claim. (15a). With regard to Hithon's claim, the panel concluded that there was sufficient evidence to support the jury verdict, because Hatley had interviewed Hithon for one of the vacancies only *after* Hatley had actually offered the job to King and after King had accepted it. (16a). The appellate court upheld the trial court's actions in granting Tyson a new trial with regard to Hithon's claim. (16a). Petitioners filed a timely petition for rehearing in the Eleventh Circuit. That petition was denied on June 23, 2005.

This Court granted a petition for writ of certiorari, and in a per curiam decision overturned the Eleventh Circuit. *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195, ___ U.S. ___ (2006). With regard to evidence that a discrimination plaintiff had superior qualifications, this Court rejected the Eleventh Circuit's "slap in the face" standard as "unhelpful and imprecise." 126 S. Ct. at 1197. The Court emphasized that "qualifications evidence may suffice, at least in some circumstances, to show pretext," 126 S. Ct. at 1197; the petition had demonstrated that the Eleventh

Circuit's "slap in the face" standard was so stringent that it had *never* been satisfied in any appellate or district court decision in that circuit.[15] This Court noted that the circuit courts had adopted conflicting standards for evaluating qualifications evidence, but expressly did not undertake to resolve that conflict. Rather, the Court remanded the case to the Eleventh Circuit with instructions to utilize instead a standard that would ensure "consistent results." 126 S. Ct. at 1198.

This Court also overturned the Eleventh Circuit's holding that "boy," as a form of address to an adult African-American man, could never as a matter of law be evidence of discriminatory animus. The Court held that this form of address could be "probative of bias," and identified several factors which should be considered in determining "[t]he speaker's meaning." 126 S. Ct. 1197.

On remand the Eleventh Circuit insisted, despite this Court's decision, that the evidence in this case still was insufficient as a matter of law to support the jury's finding of discrimination. The court of appeals held that proof that a plaintiff was better qualified than the person promoted to a disputed position could not support a finding of discrimination unless the differences in ability were so enormous "that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question." (6a). The court of appeals held that this stringent standard was not satisfied. With regard to the repeated instances in which

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[15] The petition noted that that standard had been applied in 10 Eleventh Circuit decisions and in 34 decisions by district courts within that circuit. In every case the court concluded that the standard had not been satisfied. Petition for Writ of Certiorari, *Ash v. Tyson Foods, Inc.*, No. 05-379, 11-12.

the African-American plaintiffs were addressed as "boy," the Eleventh Circuit again insisted that this classic racial slur could not support a finding of racial discrimination. (5a).

The court of appeals denied a timely petition for rehearing.

## REASONS FOR GRANTING THE WRIT

### I. THERE IS A WIDESPREAD CONFLICT AMONG THE CIRCUIT COURTS REGARDING WHEN, OR INDEED WHETHER, EVIDENCE OF COMPARATIVE QUALIFICATIONS CAN BE UTILIZED TO PROVE INVIDIOUS DISCRIMINATION IN EMPLOYMENT

This case presents the inter-circuit conflict that was recognized, but that expressly was not resolved, by this Court's February 2006 decision in the instant case. There remains a widespread inter-circuit conflict regarding when, and indeed whether, a plaintiff alleging discrimination in promotion or hiring can prove invidious discrimination by showing that he or she was more qualified than the person selected for the position in question. This Court's February 2006 decision observed that in addition to the "slap in the face" standard disapproved in that opinion, "[f]ederal courts . . . have articulated various other standards" for evaluating such qualifications evidence. 126 S. Ct. at 1197.

The Court's decision did not resolve that conflict; rather, it explained "[t]his is not the occasion to define more precisely what standard should govern pretext claims based on superior qualifications." 126 S. Ct. at 1198. In light of the Eleventh Circuit's intransigent response to this Court's February 2006 decision, the instant

case provides an exceptionally appropriate "occasion to define more precisely" the standard governing this manner of proof.

The inter-circuit conflict recognized by this Court in *Ash* is well-established and clearly defined. The Eleventh and Fifth Circuits apply a "no reasonable person" standard. In both circuits a substantial body of caselaw makes clear that this standard can virtually never be met. No appellate or district court decision in the Eleventh Circuit has ever found that a plaintiff's evidence satisfied the "no reasonable person" standard. The Seventh Circuit applies the "no reasonable person" standard more narrowly, limiting it to cases in which the plaintiff has no other evidence of unlawful intent; even in the Seventh Circuit, however, when the "no reasonable person" standard does apply, evidence of superior qualifications is always rejected. Conversely, the Ninth Circuit does not limit the use of qualifications evidence, and has repeatedly permitted a plaintiff to rely on such evidence to defeat summary judgment or to sustain a jury verdict. The Third, Fourth and District of Columbia Circuits apply intermediate standards, permitting reliance on evidence of comparative qualifications in some but not all cases.

The Eleventh Circuit first articulated the "no reasonable person" standard in 2000, and has now applied it in a dozen decisions involving a variety of federal employment discrimination cases, including claims under Title VII of the 1964 Civil Rights Act, 42 U.S.C. section 1981, the Age Discrimination in Employment Act, and the Fourteenth Amendment.[16] Under that standard, evidence that a

[16] *Taylor v. Roche*, 2006 WL 2613659, at *1 (11th Cir. Sept. 12, 2006) (Title VII); *Higgins v. Tyson Foods, Inc.*, 2006 WL 2466178, at *2

(Continued on following page)

plaintiff was better qualified cannot be relied on to prove intentional discrimination unless the differences in qualifications were so vast "that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question." (6a). The Eleventh Circuit does not claim that this "no reasonable person" standard is substantively different than the "slap in the face" standard rejected by this Court in *Ash*. To the contrary, the Eleventh Circuit has repeatedly held that the "no reasonable person" standard is identical to the rejected "slap in the face" standard.[17] The

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(11th Cir. Aug. 28, 2006) (Title VII and the Age Discrimination in Employment Act); *Milledge v. Rayonier, Inc.*, 2006 WL 2257949, at *2 (11th Cir. Aug. 8, 2006) (Title VII); *Ash v. Tyson Foods, Inc.*, 2006 WL 2219749, at *3 (11th Cir. Aug. 2, 2006) (Title VII and section 1981); *Hubbard v. M & H Valve Co.*, 2006 WL 1410147, at *1 (11th Cir. May 22, 2006) (Title VII and section 1981); *Tippier v. Spacelabs Medical, Inc.*, 2006 WL 1130809, at *3 (11th Cir. April 27, 2006) (Title VII and section 1981); *Brooks v. County Commission of Jefferson County, Ala.*, 446 F.3d 1160, 1163-64 (11th Cir. 2006) (Title VII); *Watkins v. Huntsville, Ala.*, 176 Fed. Appx. 955, 956 (11th Cir. 2006) (Title VII); *Hithon v. Tyson Foods, Inc.*, 144 Fed. Appx. 795, 800 (11th Cir. 2005) (Title VII and section 1981); *Cooper v. Southern Co.*, 390 F.3d 695, 732-33 (11th Cir. 2004) (Title VII and section 1981); *Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1254-55 (11th Cir. 2000) (Title VII) (overturning jury verdict); *Alexander v. Fulton County, Georgia*, 207 F.3d 1303, 1340-41 (11th Cir. 2000) (Section 1981 and the Fourteenth Amendment).

[17] In *Higgins v. Tyson Foods, Inc.*, 2006 WL 2466178, at *2 (11th Cir. Aug. 28, 2006), the Eleventh Circuit approved a district court decision that had "equated the language" of the "slap in the face" standard with the "no reasonable person" standard.

The Eleventh Circuit's seminal decision in *Cooper v. Southern Co.* 390 F.3d 695 (11th Cir. 2004), explained that the requirement of evidence

> "so apparent as virtually to jump off the page and slap you in the face" . . . "*should be understood to mean* that disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial

(Continued on following page)

Eleventh Circuit nonetheless insists that its adherence to the "no reasonable person" standard was "approved" by this very Court in *Ash* itself.[18]

The "no reasonable person" standard, avowedly stringent in theory, is fatal in practice. In the 12 Eleventh Circuit decisions applying this standard, no plaintiff ever succeeded in making the requisite showing. The court of appeals has applied that standard both to direct summary judgment for defendants and, as here, to overturn jury verdicts. Equally striking is the pattern of decisions

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judgment, could have chosen the candidate selected over the plaintiff for the job in question."

207 F.3d at 1340 (*quoting Cofield v. Goldkist, Inc.*, 267 F.3d 1264, 1268 (11th Cir. 2001) and *Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1254 (11th Cir. 2000)) (emphasis added). The Eleventh Circuit reiterated that the two standards were identical in *Alexander v. Fulton County, Ga.*, 207 F.3d 1303 (11th Cir. 2000) and *Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1254 (11th Cir. 2000).

In addition, in the period prior to this Court's decision in *Ash*, eight district court decisions in the Eleventh Circuit had expressed their understanding that the "slap in the face" and "no reasonable person" standards were identical. *Twilley v. Burlington Northern, etc. Rwy. Co.*, 351 F. Supp. 2d 1299, 1307 (N.D.Ala. 2004); *Harrington v. The Children's Psychiatric Center*, 2003 WL 23356396, at *10 (S.D.Fla. Dec. 9, 2006); *Dorrego v. Public Health Trust of Miami Dade County*, 293 F. Supp. 2d 1274, 1283 (S.D.Fla. 2003); *Green v. Miami-Dade County*, 2003 WL 22331877, at *8 (S.D.Fla. Sept. 9, 2003); *Rogers-Libert v. Miami-Dade County*, 184 F. Supp. 2d 1273, 1280 (S.D.Fla. 2001); *Dancy-Pratt v. The School Board of Miami-Dade County*, 2001 WL 1922063, at *7 (S.D.Fla. Dec. 13, 2001); *Humphrey v. Potter*, 162 F. Supp. 2d 1354, 1363 (S.D.Fla. 2001); *Taylor v. Williams*, 2000 WL 1844698, at *3 (S.D.Ala Oct. 30, 2000).

[18] *Taylor v. Roche*, 2006 WL 2613659, at *1 (11th Cir. Sept. 12, 2006) (describing the "no reasonable person" standard "as approved by *Ash v. Tyson Foods, Inc.*"); *Brooks v. County Commission of Jefferson County, Ala.*, 446 F.3d 1160, 1163 (11th Cir. 2006) (describing *Ash* as "approving of this language" stating the "no reasonable person" standard).

among district court decisions in the Eleventh Circuit. Since that circuit fashioned the "no reasonable person" standard in 2000, it has been applied in 28 district court decisions reproduced in Westlaw. In every one of those cases, the district judge held that the plaintiff had failed to show that the disparities in qualifications were so great that no reasonable person could have chosen the candidate selected over the plaintiff.[19] This Court has repeatedly held that discrimination plaintiffs should be permitted to rely on evidence of greater qualifications to prove discrimination. *Ash*, 126 S. Ct. at 1197; *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88 (1989); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981). The Eleventh Circuit's utilization of a standard which invariably precludes reliance on such evidence is inconsistent with this Court's decisions in *Ash*, *Patterson*, and *Burdine*.

In the Eleventh Circuit it is for judges, not juries, to decide whether evidence of qualification disparities satisfies the "no reasonable person" standard. Thus in the instant case, the dispositive finding made by the Eleventh Circuit panel was that "*we conclude* that the plaintiffs did not meet their burden . . . to show" that the "no reasonable person" standard had been met. (7a) (emphasis added).[20]

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[19] We set forth a list of those district court decisions in an Appendix to the petition.

[20] *See Higgins v. Tyson Foods, Inc.*, 2006 WL 2466178, at *2 ("the district court concluded that the plaintiff has simply failed to meet that test. We agree"); *Milledge v. Rayonier, Inc.*, 2006 WL 2257949, at *2 ("[the plaintiff's] account . . . may show that he was qualified for the position, but not that [the no reasonable person standard was met]"); *Hithon v. Tyson Foods, Inc.*, 144 Fed. Appx. 795, 800 (plaintiff "failed to establish" that the no reasonable person standard was met).

The "no reasonable person" standard is also well established in the Fifth Circuit. From the outset the Fifth Circuit (like the Eleventh Circuit) has held that the "no reasonable person" standard "should be understood to mean" the same thing as the "slap in the face" standard, the very standard rejected by this Court in *Ash v. Tyson's Food*.[21] In the Fifth Circuit it also is for the courts, not the trier of fact, to decide whether the differences in qualification were so great that no reasonable person could have rejected the plaintiff in favor of the candidate chosen.[22] That circuit recognizes that the "no reasonable person" requirement is an "extremely high" standard. *Roy v. United States Department of Agriculture*, 115 Fed. Appx. 198, 201 (5th Cir. 2004). In practice the standard is almost

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[21] *Deines v. Texas Department of Protective and Regulatory Services*, 164 F.3d 277, 280-81 (5th Cir. 1999):

> The phrase "jump off the page and slap [you] in the face" is simply a colloquial expression that we have utilized to bring some degree of understanding to the level of disparity in qualifications required to create an inference of intentional discrimination. In its essence, the phrase should be understood to mean that disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.

The "no reasonable person" formulation originated in *Deines*.

[22] See, e.g., *Runnels v. Texas Children's Hospital Select Plan*, 167 Fed. Appx. 377, 383 (5th Cir. 2006) (plaintiffs "have failed to show" that they were so much better qualified as to meet the "no reasonable person" standard); *Roy v. United States Department of Agriculture*, 115 Fed. Appx. 198, 201 (5th Cir. 2004) (the plaintiff's evidence "does not satisfy" the "no reasonable person" standard); *Reynolds v. City of Dallas*, 2004 WL 893425, at *8 (N.D.Tex. April 23, 2004) ("the Court does not find that Plaintiff's qualifications were so disparately superior to [the successful candidates'] that no reasonable person, in the exercise of impartial judgment, could have chosen them.").

impossibly high. No appellate decision in the Fifth Circuit has ever found that a plaintiff had met that standard.[23] Among the 31 district court decisions in the Fifth Circuit applying the "no reasonable person" standard,[24] there are only two highly unusual cases in which a district judge has ever found that that standard had been satisfied.

The Ninth Circuit, at the other end of the spectrum, imposes no such limitations on the use of evidence of comparative qualifications. "In *Odima* [*v. Westin Tucson Hotel*, 53 F.3d 1484 (9th Cir. 1995)], we held that the plaintiff's superior qualifications *standing alone* were enough to prove pretext." *Raad v. Fairbanks North Star Borough School District*, 323 F.3d 1185, 1194 (9th Cir. 2003) (emphasis in original). Indeed, in the Ninth Circuit even evidence that the plaintiff was *equally* qualified as the successful candidate is sufficient to support a finding of discrimination. *Margolis v. Tektronix, Inc.*, 44 Fed. Appx. 138, 141-42 (9th Cir. 2002)

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[23] *Runnels v. Texas Children's Hospital Select Plan*, 167 Fed. Appx. 377, 383 (5th Cir. 2006) (section 1981); *Roy v. United States Department of Agriculture*, 115 Fed. Appx. 198, 201 (5th Cir. 2004) (Title VII); *Cook v. Mississippi Dept. of Human Services*, 108 Fed. Appx. 852, 860 (5th Cir. 2004) (Title VII and section 1981); *Barnes v. United States Department of the Navy*, 95 Fed. Appx. 46, 50 (5th Cir. 2004) (Title VII and the ADEA); *Wright v. Columbia Women & Children's Hospital*, 2002 WL 495325, text at n.11 (5th Cir. May 18, 2002) (ADEA); *Celestine v. Petroleos de Venezuela*, 266 F.3d 343, 357 (5th Cir. 2001) (Title VII).

[24] A list of those cases is set out in an Appendix to this petition.

In *Chustz v. City of New Orleans*, 2002 WL 31556353, at *10 (E.D.La. Nov. 15, 2002), the successful candidate for a high level administrative post (as the employer well knew) was addicted to crack cocaine, had been fired from his previous position for drug abuse, and did not meet the minimum requirements for the new post. In *Lall v. Perot Systems Corp.*, 2004 WL 884438, at *7 (W.D.Tex. April 23, 2004), all four of the original founders of the business unit in question executed affidavits stating that plaintiff was the best qualified candidate.

("Margolis' principal argument is that . . . she is more qualified than one or more male managers. . . . Margolis' evidence on this point, if believed, is adequate . . . to survive summary judgment. A jury could find that Tektronix['s explanation] is a pretext for discrimination if it believes that Margolis was, in fact, more (or at least as) qualified."); *Tucevich v. State of Nevada*, 1999 WL 62735, at *1 (9th Cir. Jan. 22, 1999) (reversing award of summary judgment in part because "the evidence indicates that Tucevich was equally qualified, if not more qualified, than the individuals that defendant hired.") Unlike the Eleventh Circuit, which asserts that this Court's decision in *Ash* approved the "no reasonable person" bar to such evidence, the Ninth Circuit cites *Ash* for the contrary proposition that qualifications evidence "may suffice . . . to show pretext." *Cornwell v. Electra Central Credit Union*, 439 F.3d 1018, 1033 (9th Cir. 2006).

This sharp difference in the standards applied to evidence of comparative qualifications is clearly outcome determinative. The Ninth Circuit has repeatedly done something that the Eleventh and Fifth Circuits have invariably refused to do under the "no reasonable person" standard – upheld a discrimination claim because the plaintiff had offered evidence of his or her greater qualifications. In seven cases the Ninth Circuit has relied on such evidence to deny summary judgment to a defendant employer. *Cornwell v. Electra Central Credit Union*, 439 F.3d at 1033-34 (9th Cir. 2006) (Title VII) ("a reasonable jury might . . . view the disparity between [the plaintiff's] management experience and [that of the person treated more favorably] as proof that the Defendant's explanation . . . was a pretext for race discrimination."); *Margolis v. Tektronix, Inc.*, *supra*; *Haas v. Betz Laboratories, Inc.*, 1999 WL 451206, at *2 (9th Cir. June 23, 1999) ("Haas

also has established pretext indirectly by offering evidence that the chosen applicant . . . was not the most qualified applicant for the job."); *Tucevich v. State of Nevada*, *supra*; *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998) ("Facts tending to show that the chosen applicant may not have been the best person for the job are probative as they 'suggest that [the defendant's explanation] may not have been the real reason for choosing [the applicant selected] over the [plaintiff].'") (*quoting Lindahl v. Air France*, 930 F.2d 1434, 1439 (9th Cir. 1991)); *Thomas v. California State Department of Corrections*, 1992 WL 197414, at *3 (9th Cir. Aug. 18, 1992) ("we find that . . . a rational trier of fact could conclude that Thomas was more qualified [than the person hired] and that the Department's articulated reasons for rejecting him were pretextual."); *Lindahl v. Air France*, 930 F.2d 1434, 1439 (9th Cir. 1991) ("All of these facts tend to show that [the person promoted] may not have been the best person to lead the group, and they therefore suggest that leadership ability may not have been the real reasons for choosing [him] over Lindahl.").

In the Ninth Circuit, the degree to which the qualifications of the plaintiff exceed those of the successful applicant are matters for consideration by the trier of fact, not a possible basis for summary judgment or judgment as a matter of law. *Thomas v. California State Department of Corrections*, *supra*. "The closer the qualifications of the candidates, the less *weight* the [trier of fact] should give to perceived differences in deciding whether the proffered explanations were pretextual." *Odima v. Westin Tucson*

*Hotel Co.*, 991 F.2d 585, 602 (9th Cir. 1993) (emphasis added).[25]

The Sixth Circuit in *Jenkins v. Nashville Public Radio*, 106 Fed. Appx. 991 (6th Cir. 2004), explained that

> This circuit has never adopted the [Fifth Circuit] requirement that in order to raise a genuine issue as to whether the plaintiff was rejected because of an improper motive rather than because of the exercise of discretionary business judgment, the plaintiff must demonstrate qualifications that are "vastly – or even clearly" greater than those of the successful applicant. And we cannot readily reconcile [such a requirement] with the well-established principle of *Burdine* that "[t]he fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981).

106 Fed. Appx. at 994. Relying on evidence that an employment discrimination plaintiff was better qualified, the Sixth Circuit overturned district court decisions awarding summary judgment to the defendant employers in *Jenkins*, in *Zambetti v. Cuyahoga Community College*, 314 F.3d 249, 259 (6th Cir. 2002), and in *King v. Healthrider, Inc.*, 1999 WL 825122 (6th Cir. Oct. 8, 1999). In *Carberry v. Monarch Marking Systems, Inc.*, 30 Fed. Appx. 389, 392 (6th Cir. 2002), the Sixth Circuit upheld a jury's finding of discrimination largely because of evidence that the plaintiff was

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[25] Because the claims in *Odima* had been determined at a bench trial, the Ninth Circuit referred in this instance to evaluation of the weight of the evidence by the trial court.

the better qualified applicant. And in *Glenn's Trucking Co. v. NLRB*, 298 F.3d 502, 506 (6th Cir. 2002), the Sixth Circuit upheld an NLRB finding of discrimination against union members in light of evidence that "the discriminatees appear to be more qualified than those individuals who were hired."

The District of Columbia Circuit has adopted an intermediate standard. In a sharply divided en banc decision, that court of appeals held that

> [i]f a factfinder can conclude that a reasonable employer could have found the plaintiff to be *significantly better qualified* for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate – something employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture.

*Aka v. Washington Hosp. Center*, 156 F.3d 1284, 1294 (D.C. Cir. 1998) (en banc) (emphasis added). This standard is more demanding than that in the Ninth Circuit (which does not require that the difference in qualification be *significant*) but less demanding than that in the Eleventh and Fifth Circuits (which require differences in qualifications to be overwhelming, and which insist that the court, not the factfinder, should determine if that standard is met.) In both *Aka* and *Lathram v. Snow*, 336 F.3d 1085, 1092-93 (D.C.Cir. 2003), the District of Columbia Circuit relied on evidence regarding comparative qualifications to overturn decisions awarding summary judgment to defendants. On the other hand, that circuit has upheld summary judgment for employers where it concluded that a reasonable jury could not find that the plaintiff was "significantly better qualified." *Carter v. George Washington University*, 387 F.3d

872, 881-82 (D.C.Cir. 2004); *Stewart v. Ashcroft*, 352 F.3d 422, 429-30 (D.C.Cir. 2003).

The Fourth Circuit also applies an intermediate standard, requiring that the qualifications evidence be sufficient to permit a finding that the plaintiff was "discernibly better qualified" *Heiko v. Colombo Savings Bank, F.S.B.*, 434 F.3d 249, 261 (4th Cir. 2006), or "plainly superior." *Dennis v. Columbia Colleton Medical Center, Inc.*, 290 F.3d 639, 649 n.4 (4th Cir. 2002). The Fourth Circuit relied on such qualifications evidence to uphold a jury's finding of discrimination in *Dennis*, and to overturn the award of summary judgment in *Heiko*.

In *Bray v. Marriott Hotels*, 110 F.3d 986 (3d Cir. 1997), the Third Circuit relied on evidence of comparative qualifications to deny summary judgment to an employer; the court divided sharply, however, regarding what standard should be applied. The majority held that the plaintiff could rely on evidence that she was better qualified than the successful applicant (110 F.3d at 995-97), while the dissenting judge would have insisted on evidence that "the qualifications were extremely disproportionate." 110 F.3d at 1000 (Alito, J., dissenting). The majority objected that the standard proposed in the dissent would "immunize an employer from the reach of Title VII," 110 F.3d at 993, but then Judge Alito objected that the majority's holding would bring about "an unwarranted extension of the anti-discrimination laws." 110 F.3d at 1002.

The Seventh Circuit has adopted a hybrid approach. Where a plaintiff relies *solely* on evidence of comparative qualifications, the Seventh Circuit utilizes the Eleventh Circuit "no reasonable person" standard.[26] On the other

[25] See cases cited at n.28.

hand, where the plaintiff has other evidence (albeit evidence not by itself sufficient to support a finding of discrimination), the Seventh Circuit uses the Ninth Circuit standard, permitting reliance without limitation on evidence of comparative qualifications.[27]

In the Seventh Circuit, as elsewhere, the standard utilized is of conclusive importance. In the Seventh Circuit there are 9 appellate[28] and 24 district court decisions[29] applying the "no reasonable person" standard. In every one of these 33 cases the court held that the plaintiff's evidence could not satisfy that standard. On the other hand, in all of the cases in the Seventh Circuit applied the less demanding Ninth Circuit standard, the court concluded that the plaintiff's evidence was sufficient to withstand summary judgment.[30]

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[27] *Harvey v. Office of Banks and Real Estate*, 377 F.3d 698, 712-13 (7th Cir. 2004) (Title VII and section 1981); *David v. Caterpillar, Inc.*, 324 F.3d 851, 861-63 (7th Cir. 2003) (Title VII).

[28] *Sublett v. John Wiley & Sons, Inc.*, 2006 WL 2613509, at *7 (7th Cir. Sept. 13, 2006) (Title VII); *Mlynczak v. Bodman*, 442 F.3d 1050, 1060 (7th Cir. 2006) (Title VII); *Farrell v. Butler University*, 421 F.3d 609, 613-16 (7th Cir. 2005) (Title VII); *Cichon v. Exelon Generation Co., L.L.C.*, 401 F.3d 803, 813 (7th Cir. 2005) (Fair Labor Standards Act); *Jordan v. City of Gary, Indiana*, 396 F.3d 825, 834 (7th Cir. 2005) (Title VII and ADEA); *Reed v. Lawrence Chevrolet, Inc.*, 108 F.3d 393, 395-96 (7th Cir. 2004) (Title VII); *Reed v. Manteno School Dist. No. 5*, 59 Fed. Appx. 868, 871-72 (7th Cir. 2003) (Title VII and ADEA); *Bernales v. Cook*, 37 Fed. Appx. 792, 795 (7th Cir. 2002) (Title VII); *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1182 (7th Cir. 2002) (Title VII).

[29] A list of those decisions is set forth in an appendix to this petition.

[30] *Harvey v. Office of Banks and Real Estate*, *supra*; *David v. Caterpillar, Inc.*, *supra*; *Lust v. Sealy, Inc.*, 277 F. Supp. 2d 973, 988 (W.D.Wis. 2003) (Title VII); *Kozlowski v. Fry*, 238 F. Supp. 2d 966, 1012 (N.D.Ill. 2002) (Title VII).

The question presented is of manifest importance. In the Eleventh, Fifth and Seventh Circuits there are 110 decisions applying the "no reasonable person" standard. The total number of discrimination cases in those three circuits involving qualifications evidence is substantially higher; in the Eleventh and Fifth Circuits, for example, there have also been numerous other decisions applying the semantically distinct but substantively identical "slap in the face" standard.[31] Cases involving this type of evidence also arise with considerable frequency in the other circuits. In the absence of a decision by this Court resolving the question left open in its February 2006 decision in the instant case, the large number of claims resting on such evidence will continue to be decided differently depending on the circuit in which an action is filed. Certiorari should be granted to resolve that conflict.

## II. THE DECISION OF THE ELEVENTH CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT AND OF NUMEROUS COURTS OF APPEALS REGARDING THE EVALUATION OF BIASED REMARKS IN DISCRIMINATION CASES

In its 2005 decision, the Eleventh Circuit held that addressing an adult African-American man as "boy" (unlike "black boy") could never as a matter of law be evidence of racial animus. (14a). This Court overturned that per se rule. In *Ash* this Court held that the significance of such a remark would depend on "[t]he speaker's meaning," and listed a number of factors to be considered

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[31] Petition for Writ of Certiorari, *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195 (2006), No. 05-379, pp. 10-14 (listing 90 "slap in the face" cases in the Fifth and Eleventh Circuits).

in determining the speaker's intent. 126 S. Ct. at 1197. On remand, however, the Eleventh Circuit responded with a flurry of new objections to the evidence of these potentially damning statements. In its determination to find some reason to again overturn the jury's finding of discrimination, the court of appeals flatly disregarded several controlling decisions of this Court, including this Court's February 2006 decision in the instant case.

First, the Eleventh Circuit held that the repeated use of the term "boy" was not probative because the remarks were "ambiguous." (5a). But in *Ash* this Court itself had already noted that very ambiguity, expressly recognizing that this form of address does not invariably have the same meaning. "Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign." *Ash*, 126 S. Ct. at 1197. On remand the court of appeals has now held that that very ambiguity precludes a trier of fact from relying on evidence that the term "boy" was used to address African-American men. That is emphatically contrary to this Court's holding in *Ash* that the trier of fact is to resolve that ambiguity and by so doing is to ascertain "[t]he speaker's meaning." *Id.* By holding that the ambiguity in "boy" (unlike "black boy") precludes reliance on this evidence, the Eleventh Circuit has resuscitated the very rule rejected by this Court in *Ash*.

Second, in making its determination that the plant manager had no racial intent in using the term "boy," the Eleventh Circuit objected that the factors set forth in this Court's decision in *Ash* for interpreting that usage were not "in the record." (5a). But two of the factors identified by this Court, "inflection" and "tone of voice," by their very nature would never be reflected in a cold transcript. 126

S. Ct. at 1197. Only the trier of fact, unlike an appellate court, would "be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985). At the trial in the instant case, a witness reproduced for the jury the tone and inflection with which the term "boy" had been used.[32] The Eleventh Circuit, by insisting that the interpretation of allegedly discriminatory remarks be made by an appellate court based solely on the content of the transcript, effectively refused to comply with this Court's decision in *Ash* that inflection and tone of voice *should* be considered in determining a speaker's meaning.[33]

Third, the Eleventh Circuit objected that the "boy" remarks, even if they did indicate "general racial bias" on the part of the plant manager, were nonetheless legally irrelevant because the remarks were not made at the time of the promotion decisions and, in the court's view, were for that reason "totally unrelated to the promotions at issue." (5a). In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), this Court emphatically rejected that very basis for disregarding biased remarks. In *Reeves*, as here, the court of appeals held that evidence of biased remarks could not support a jury verdict of discrimination because "these comments were not made in the direct context of Reeves's termination." 197 F.3d 688, 693 (5th Cir. 1999). This Court held, to the contrary, that such

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[32] See n.4, *supra*.

[33] *Cf. Anderson v. City of Bessemer City*, 470 U.S. at 579 ("it is easy to imagine that the tone of voice with which the witness related her comment . . . might have conclusively established that the remark was a facetious one.")

remarks were probative even if not made in connection with the disputed employment decision.

> In holding that the record contained insufficient evidence to sustain the jury's verdict, the Court of Appeals misapplied the standard of review dictated by Rule 50. . . . The court . . . failed to draw all reasonable inferences in favor of petitioner. For instance, while acknowledging "the potentially damning nature" of [a decisionmaker's] age-related comments, the court discounted them on the ground that they "were not made in the direct context of Reeves's termination."

530 U.S. at 162.

In the wake of *Reeves*, other circuits have correctly insisted that it is for the trier of fact to evaluate the type of evidence which the Eleventh Circuit insists can never be probative. In *Russell v. McKinney Hospital Venture*, 235 F.3d 219 (5th Cir. 2000), the Fifth Circuit explained:

> In light of the Supreme Court's admonition in *Reeves*, our pre-*Reeves* jurisprudence regarding so-called "stray remarks" must be viewed cautiously. . . . Age-related remarks are appropriately taken into account when analyzing the evidence supporting a jury verdict (even if not in the direct context of the decision . . . )

235 F.3d at 229.[34] In *Plotke v. White*, 405 F.3d 1092 (10th Cir. 2005), the Tenth Circuit held:

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[34] See *Palasota v. Haggar Clothing Co.*, 342 F.3d 569, 578 (5th Cir. 2003) ("Post-*Reeves*, this court has taken a more 'cautious' view of the stray remark doctrine. . . . Age-related remarks 'are appropriately taken into account when analyzing the evidence supporting the jury's verdict,' even when the comment is not in the direct context of the termination. . . .") (*quoting Russell*); *Hooker v. Victoria's Secret Stores, Inc.*, 2001 WL 1692436 (5th Cir. Nov. 21, 2001) ("[I]n light of the Supreme Court's

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> The Supreme Court has emphasized that courts should not reject a plaintiff's evidence of additional circumstantial gender-based comments . . . because they 'were not made in the direct context of [the plaintiff's termination.' *Reeves*, 350 U.S. at 151-53. . . . Accordingly, we have held that gender-based comments by a plaintiff's supervisor can be relevant evidence of pretext . . . even when such comments were not directly limited to the termination decision.

405 F.3d at 1107. Both before and after *Reeves* that Ninth Circuit has recognized that biased remarks are probative of pretext even though the remarks were not made in connection with the disputed employment decision, or even about the plaintiff. *Chuang v. University of California Davis, Bd. of Trustees*, 225 F.3d 1115, 1128 (9th Cir. 2000) (the supervisor's "remark establishes discriminatory intent even though it was uttered during consideration of *different* Asian-American's potential employment") (emphasis added) (citing *Reeves*); *Cardova v. State Farm Ins. Companies*, 124 F.3d 1145, 1149 (9th Cir. 1997) ("if such remarks were indeed made, they could be proof of discrimination against [the plaintiff] despite their reference to *another* agent and their utterance *after*" the employment decision in dispute) (emphasis added).

Fourth, the Eleventh Circuit on remand made its own finding of fact that the white plant manager who made the

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holding in *Reeves*. . . . 'the potentially damning nature of . . . age-related comments' cannot be discounted 'on the ground that they were not made in the direct context' of an adverse employment decision.") (*quoting Russell*); *Evans v. City of Bishop*, 238 F.3d 586, 591-92 (5th Cir. 2000) ("*Reeves* emphatically states that requiring evidence of discriminatory animus to be 'in the direct context' of the employment decision is incorrect.").

remarks did not intend to use the term "boy" with a racial meaning.

> The usages were conversational and *as found* by the district court *were non-racial* in context. . . . The lack of a modifier in the context of the use of the word "boy" in this case was not essential to *the finding* that it was not used racially. . . . The statements . . . *showed* no indication of general racial bias . . . by [the plant manager].

(5a) (Emphasis added).

This Court has made clear, however, that discerning the intent behind such extra-judicial statements is a question of fact for the trier of fact, not a question of law for the courts. *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). Whether a speaker intended to use the term "boy" or some other language in a racial manner is as much a question of fact as whether an employer intended to promote or fire a worker because of his or her race. Thus whether in this case the manager intended the term "boy" in a racial manner was, like the question of racial motive in promotions, a matter to be resolved by the jury.

In *Anderson* a finding of discrimination in hiring turned in part on whether a particular statement that had been made during a critical job interview was intended by the speaker to be serious or facetious. Following a bench trial, the district judge concluded that the remark was facetious, and relied on that finding in concluding that intentional discrimination had occurred. The Fourth Circuit reinterpreted the intent behind that remark, concluded that the remark was not facetious, and therefore reversed the find of discrimination. This Court unanimously reinstated the discrimination finding, explaining that the appellate court had erred in substituting its own finding regarding the meaning of the remark in

question for the conclusions of the trier of fact. "[T]he error of the Court of Appeals was its failure to give due regard to the ability of the District Court to interpret and discern the credibility of oral testimony." 470 U.S. at 577.

In the wake of *Anderson*, numerous courts of appeals – unlike the Eleventh Circuit in this case – have recognized that the interpretation of extra-judicial statements that could indicate possible bias is a matter for the trier of fact. *Phelan v. Cook County*, 463 F.3d 773, 782 (7th Cir. 2006) ("To the extent that the discriminatory nature of . . . these remarks is ambiguous, we note that 'the task of disambiguating ambiguous utterances is for trial, not for summary judgment.'") (*citing Shager v. Upjohn Co.*, 913 F.3d 398, 402 (7th Cir. 1990)); *EEOC v. Heartway Corp.*, 2006 WL 3030562, at *8 (10th Cir. Oct. 26, 2006) ("Although this is arguably an ambiguous statement, a jury could reasonably find that [the employee] was being fired because [of her disability]"); *Thanonsingh v. Board of Educ.*, 462 F.3d 762, 781-82 (7th Cir. 2006) ("the statement could be interpreted reasonably by a juror as probative evidence that [the speaker] harbored animus against persons for whom English is a second language."); *Green v. City of New York*, 2006 WL 2846473, at *10 (2d Cir. Oct. 5, 2006) ("the district court, on summary judgment, should have resolved the ambiguity against [the defendant]"); *Shager v. Upjohn Co.*, 913 F.2d 398, 401 (7th Cir. 1990) (the district judge who improperly awarded summary judgment "considered the comments on age attributed to [the supervisor] to be ambiguous. That they were. But the task of disambiguating ambiguous utterances is for trial, not for summary judgment."); *Siegel v. Alpha Wire Corp.*, 894 F.2d 50, 55 (3d Cir. 1990) ("a jury could find that . . . that phrase . . . indicated bias against older employees. Of course, a jury could also decide [otherwise] . . . but that is

precisely the sort of question that should be left to the jury.").

Certiorari should be granted to bring the Eleventh Circuit into compliance with this Court's decisions in *Ash*, *Anderson*, and *Reeves*, and to resolve these inter-circuit conflicts.

## CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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2006 WL 2219749

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 04-11695

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D.C. Docket No.
96-03257-CV-RRA-M

ANTHONY ASH,
JOHN HITHON,

Plaintiffs-Appellants,

versus

TYSON FOODS, INC.,
a corporation,

Defendant-Appellee.

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Appeal from the United States District Court
for the Northern District of Alabama

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(August 2, 2006)

**ON REMAND FROM THE**
**UNITED STATES SUPREME COURT**

Before DUBINA, CARNES and MARCUS, Circuit Judges.

PER CURIAM:

## I.

Appellants Anthony Ash ("Ash") and John Hithon ("Hithon"), black males, (collectively "the plaintiffs") appeal the district court's orders (1) granting Tyson Foods, Inc.'s ("Tyson") renewed motion for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50(b), on their 42 U.S.C. § 2000e *et seq.* ("Title VII") and 42 U.S.C. § 1981 discrimination claims, and (2) alternatively granting Tyson's motion for a new trial, pursuant to Fed. R. Civ. P. 50(c), on the basis that the jury's punitive and compensatory damages were excessive and unsupported by the evidence.

In an unpublished decision, we affirmed the district court's alternative grant of a new trial on Hithon's claims because there was insufficient evidence to support the punitive damages award and the compensatory damages award was excessive, but upheld the court's dismissal of Ash's claims on grounds that he did not prove discrimination. *See Ash v. Tyson Foods, Inc.*, 129 Fed. Appx. 529 (11th Cir. 2005), *vacated*, 126 S. Ct. 1195 (2006). Hithon's evidence demonstrated that Supervisor Hatley may not have interviewed Hithon until after he selected Randy King ("King"), a white shift manager at an Arkansas plant, for the position in question. We held this evidence to be sufficient to permit a jury to decide whether Hithon's articulated reasons for not selecting him were a pretext for race discrimination.

On petition for writ of certiorari, the Supreme Court of the United States granted the writ, vacated our judgment, and remanded the case for further consideration. Specifically, the Supreme Court found fault with our partial reliance on an articulation of the comparative qualifications standard as one where pretext is shown only

when the disparity in qualifications is so apparent as to virtually "jump off the page and slap you in the face." It also instructed that this court erred by concluding that the use of "boy" alone is not evidence of racial discrimination unless accompanied by racial qualifiers when evaluating whether such references to plaintiffs were evidence of racial bias. *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195 (2006).

The Supreme Court remanded the case to us with instructions to determine whether these two findings were essential to our holding and to determine if the standards written more appropriately would change the ultimate finding. The Supreme Court specifically cautioned that its decision should not be read to hold that petitioners' evidence necessarily showed pretext.

## II.

We review a district court's grant of a Fed. R. Civ. P. 50(b) renewed motion for judgment as a matter of law *de novo* and apply the same standard as the district court. *See Abel v. Dubberly*, 210 F.3d 1334, 1337 (11th Cir. 2000). In reviewing the evidence, we draw all factual inferences and resolve all credibility determinations in favor of the non-moving parties, who in this case are Ash and Hithon. *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340, 1344 (11th Cir. 2000). However, "the non-movant must put forth more than a mere scintilla of evidence suggesting that reasonable minds could reach differing verdicts," and must show "[a] substantial conflict in the evidence . . . before a matter will be sent to the jury." *Abel*, 210 F.3d at 1337. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are

jury functions, not those of a judge." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 2110, (2000) (citation omitted). "[A] motion for judgment as a matter of law will be denied only if reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions." *Abel*, 210 F.3d at 1337 (citation and internal quotations omitted).

We review a district court's grant of a new trial for an abuse of discretion. *F.D.I.C. v. Stahl*, 89 F.3d 1510, 1514 (11th Cir. 1996). The district court should grant a motion for a new trial when

> the verdict is against the clear weight of the evidence or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. . . . Because it is critical that a judge does not merely substitute his judgment for that of the jury, new trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great – not merely the greater – weight of the evidence.

*Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th Cir. 2001) (internal citations and quotation omitted).

## III.

The Supreme Court held that the word "boy" used without modification was "not always benign" and could be evidence of racially discriminatory intent. The Court listed five non-exclusive factors which may indicate whether the word is evidence of racial animus – "context, inflection,

tone of voice, local custom and historical usage." *Ash*, 126 S. Ct. at 1197.

After reviewing the record, we conclude once again that the use of "boy" by Hatley was not sufficient, either alone or with the other evidence, to provide a basis for a jury reasonably to find that Tyson's stated reasons for not promoting the plaintiffs was racial discrimination. The usages were conversational and as found by the district court were non-racial in context. But even if somehow construed as racial, we conclude that the comments were ambiguous stray remarks not uttered in the context of the decisions at issue and are not sufficient circumstantial evidence of bias to provide a reasonable basis for a finding of racial discrimination in the denial of the promotions. The lack of a modifier in the context of the use of the word "boy" in this case was not essential to the finding that it was not used racially, or in such a context as to evidence racial bias, in the decisions at issue, even if "boy" is considered to have general racial implications. The statements were remote in time to the employment decision, totally unrelated to the promotions at issue, and showed no indication of general racial bias in the decision making process at the plant or by Hatley. Moreover, there is nothing in the record about the remaining factors to support an inference of racial animus in the use of the term "boy."

There was insufficient evidence of bias in the circumstances of this case to overcome the articulated reasons for Hatley's decision, which was that the selected applicants were not associated with the prior poor performance of the plant, they had demonstrated leadership and management skills, they had superior recommendations, and they had experience in the poultry industry at more than one Tyson

plant. The only negative – King's lack of a college degree – made him equally, but not less, qualified educationally than the plaintiffs. Thus, we conclude that the "boy" comments, with the other evidence presented, do not provide a reasonable basis for a finding of racial discrimination in the context of the employment decisions at issue here.

## IV.

In its opinion vacating our judgment, the Supreme Court instructed that the visual image of words "jumping off the page to slap you in the face" was unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications. The Court concluded that "some formulation other than the test . . . articulated . . . by those words would better insure that the trial courts reach consistent results," citing by way of contrast the articulated standard used in *Cooper v. Southern Co.*, 390 F.3d 695, 732 (11th Cir. 2004), *cert. denied*, ___ U.S. ___, 126 S. Ct. 478 (2005), to-wit: "disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question." *Ash*, 126 S. Ct. at 1197.

The "jump off the page test" was not essential to this court's initial conclusion that the comparative qualifications evidence did not provide sufficient evidence of pretext. Since *Ash*, we have utilized the *Cooper* standard to evaluate the level of disparity necessary to constitute proof of pretext claimed on the basis of comparative qualifications. *See, e.g., Brooks v. County Commission of Jefferson County, Al*, 446 F.3d 1160 (11th Cir. 2006);

*Watkins v. City of Huntsville*, (No. 04-15607) (11th Cir. Apr. 18, 2006); *Roper v. City of Foley Police Dept.*, (No. 05-15199) (11th Cir. Apr. 18, 2006); *Price v. M & H Valve Co.*, (No. 05-15205) (11th Cir. Apr. 7, 2006). In these cases, comparative qualifications and other alleged indicia of discrimination (i.e., subjective criteria used by the decision-maker, plaintiff's belief that his (or her) qualifications were superior), were held insufficient for a factfinder reasonably to find that the decision was not based on the qualifications of the applicants.

On this record, we conclude that the plaintiffs did not meet their burden under *Cooper* to show that the disparities between their qualifications and the qualifications of King and Dade were "of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question." *Cooper*, 390 F.2d at 732.

## V.

After applying the above standards, we reinstate the previous holdings of our decision. We affirm the district court's grant of judgment as a matter of law in favor of Tyson on Ash's discrimination claims. We reverse the district court's grant of judgment as a matter of law in favor of Tyson on Hithon's discrimination claims but, with respect to Hithon, we affirm the district court's order alternatively granting a new trial because there was insufficient evidence to support the jury's punitive damages award, and the compensatory damages award was excessive. We remand this case to the district court to conduct further proceedings consistent with this opinion.

**AFFIRMED in part, REVERSED and REMANDED in part.**

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129 Fed.Appx. 529

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 04-11695
Non-Argument Calendar

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D. C. Docket No. 96-03257-CV-RRA-M

ANTHONY ASH,
JOHN HITHON,

Plaintiffs-Appellants,

EDDIE BULLOCK, et al.,

Plaintiffs,

versus

TYSON FOODS, INC.,
a corporation,

Defendant-Appellee,

THOMAS HARTLEY,
an individual,

Defendant.

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Appeal from the United States District Court
for the Northern District of Alabama

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**(April 19, 2005)**

Before DUBINA, CARNES and MARCUS, Circuit Judges.

PER CURIAM:

Appellants Anthony Ash and John Hithon, black males, (collectively "the appellants") appeal the district court's orders (1) granting Tyson Foods, Inc.'s renewed motion for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50(b), on their 42 U.S.C. § 2000e *et seq.* ("Title VII") and 42 U.S.C. § 1981 discrimination claims, and (2) alternatively granting Tyson's motion for a new trial, pursuant to Fed. R. Civ. P. 50(c), on the basis that the jury's punitive and compensatory damages awards were excessive and unsupported by the evidence. We affirm in part and reverse and remand in part.

During the summer of 1995, the appellants, who were superintendents at Tyson's Gadsen, Alabama poultry plant, applied for two shift manager positions at the Gadsen plant. Thomas Hatley, the Gadsen plant manager, decided to hire Randy King and Steve Dade, white males, for the two shift manager positions. Following Hatley's decision to choose King and Dade for the shift manager positions, the appellants filed suit, claiming, *inter alia*, that their failure to be promoted to the shift manager positions violated their rights under Title VII and 42 U.S.C. § 1981.

A. *Judgment as a Matter of Law*

On appeal, the appellants initially argue that the district court should not have granted Tyson's renewed motion for judgment as a matter of law because it had denied the motions for judgment as a matter of law at trial and there were no intervening events to justify the court to change its mind. The appellants then contend that Tyson's reasons for not promoting them were pretextual.

In support of the pretext argument, the appellants argue that: (1) Hatley provided shifting reasons for his decision not to hire them; (2) Hatley used qualifications that (a) were not required by company policy, and (b) excluded the appellants; (3) Hatley only checked references for black candidates and did not review King's or Dade's performance reviews or personnel files; (4) Hatley lied about a college degree requirement for the shift manager position; (5) Hatley offered King the shift manager position before interviewing Hithon for the job; (6) Hatley hand-picked Dade for the shift manager position despite telling the superintendents that he would hold the position open before deciding on the promotion; (7) Tyson failed to prove that the Gadsen plant was losing money when Ash and Hithon were superintendents; and (8) Hatley's decision was made in an atmosphere where black employees were treated differently, including Hatley's cool demeanor toward the appellants and his statements referring to the appellants as "boys."

We review a district court's grant of a Fed. R. Civ. P. 50(b) renewed motion for judgment as a matter of law *de novo* and apply the same standard as the district court. *See Abel v. Dubberly*, 210 F.3d 1334, 1337 (11th Cir. 2000). In reviewing the evidence, we draw all factual inferences and resolve all credibility determinations in favor of the non-moving parties, which in this case are Ash and Hithon. *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340, 1344-45 (11th Cir. 2000). However, "the non-movant must put forth more than a mere scintilla of evidence suggesting that reasonable minds could reach differing verdicts[,]" and must show "[a] substantial conflict in the evidence . . . before a matter will be sent to the jury." *Abel*, 210 F.3d at 1337. "Credibility determinations, the weighing of the

evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000) (citation and internal quotation omitted). "A motion for judgment as a matter of law will be denied only if reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions." *Abel*, 210 F.3d at 1337 (citation, internal punctuation and quotation omitted).

Title VII of the Civil Rights Act of 1964 prohibits an employer from "discriminat[ing] against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race. . . . " 42 U.S.C. § 2000e-2(a)(1). Under 42 U.S.C. § 1981, every person in the United States:

> shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a). This statute is interpreted as "afford[ing] a federal remedy against discrimination in private employment on the basis of race." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60, 95 S.Ct. 1716, 1720, 44 L.Ed.2d 295 (1975). When a case of intentional discrimination is brought under either Title VII or § 1981, we employ the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), framework. *See Cooper v. Southern Co.*, 390 F.3d 695, 724 n. 16 (11th Cir. 2004).

Under *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824, the plaintiff must first establish a *prima facie* case of discrimination, which a plaintiff establishes in a failure to promote case by showing that: (1) "he is a member of a protected class"; (2) "he was qualified for and applied for the promotion"; (3) "he was rejected"; and (4) "other equally or less qualified employees who were not members of the protected class were promoted." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1539 n. 11 (11th Cir. 1997) (citations omitted). Once a *prima facie* case is developed, the defendant has the burden of producing a legitimate, non-discriminatory reason for its decision. *See Reeves*, 530 U.S. at 142, 120 S.Ct. at 2106. Once these two burdens have been met, the *McDonnell Douglas* framework disappears, and the sole issue is whether the employer acted discriminatorily. *Id.* at 142-43, 120 S.Ct. at 2106. The plaintiff always has the ultimate burden to prove that discrimination existed and may establish discrimination "by showing that the employer's proffered explanation is unworthy of credence." *Id.* (citation and internal quotation omitted). Therefore, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148, 120 S.Ct. at 2109. However, an employer would be entitled to judgment as a matter of law where "the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.* (citations omitted).

We have held that isolated general racial comments "are not *direct* evidence of discrimination because they are either too remote in time or too attenuated because they

were not directed at the plaintiff, . . . [. However,] we have not held that such comments can never constitute *circumstantial* evidence of discrimination." *Ross v. Rhodes Furniture, Inc.*, 146 F.3d 1286, 1291 (11th Cir. 1998) (citation omitted). When a racial comment is provided as evidence, we examine whether the comment "when read in conjunction with the entire record, [is] circumstantial evidence of those decision makers' discriminatory attitude. If so, the court must then determine whether such circumstantial evidence, along with other evidence . . . , might lead a reasonable jury to disbelieve [the employer's] proffered reason for [not promoting the employee]." *Id.* at 1292. While the use of "boy" when modified by a racial classification like "black" or "white" is evidence of discriminatory intent, *see Browning v. President Riverboat Casino-Missouri, Inc.*, 139 F.3d 631, 635 (8th Cir. 1998) (indicating that the use of "that white boy" was evidence of a discriminatory attitude), the use of "boy" alone is not evidence of discrimination. *See Ruby v. Springfield R-12 Public School Dist.*, 76 F.3d 909, 912 (8th Cir. 1996) (holding that referring to the appellant as "boy" and comments about clothing and blacks committing more crimes were not evidence of pretext); *Bonner v. Home Depot*, 323 F.Supp.2d 1250, 1258-59 (S.D. Ala. 2004), *aff'd*, No. 04-12887 (11th Cir. 2004) (finding that a single reference to a plaintiff as "boy" was not evidence of pretext).

We have noted that "[s]tanding alone, deviation from a company policy does not demonstrate discriminatory animus." *Mitchell v. USBI Co.*, 186 F.3d 1352, 1355-56 (11th Cir. 1999) (citation omitted). However, we have also observed that deviation from company policy can be circumstantial evidence of discrimination, especially where the rules were bent or broken to give a non-minority

applicant an advantage. *See Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 644 (11th Cir. 1998); *see also Berg v. Fla. Dept. of Labor and Employment Sec., Div. of Vocational Rehab.*, 163 F.3d 1251, 1255 (11th Cir. 1998) (suggesting that failure to adhere to or inconsistent application of policies may be circumstantial evidence of discrimination where there is a showing that the policies were applied to others). Additionally, a plaintiff's showing that an employer's reason for not following a company policy was pretextual does not establish intentional discrimination without a finding that the employer acted because of race. *See Clark v. Huntsville City Bd. of Educ.*, 717 F.2d 525, 528 (11th Cir. 1983).

Finally, we have indicated that the issue in discrimination cases is not whether one employee is better qualified than another because we do not sit in judgment of an employer's decision. *See Cooper v. Southern Co.*, 390 F.3d 695, 732 (11th Cir. 2004). As a result, "[i]n a failure to promote case, a plaintiff cannot prove pretext by simply showing that [ ]he was better qualified than the individual who received the position that [ ]he wanted." *See Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1253 (11th Cir. 2000). Pretext can be established through comparing qualifications only when "the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face." *Cooper*, 390 F.3d at 732 (citation and internal quotation omitted). However, an employee's showing that the employer hired a less qualified candidate is probative of whether the employer's reason is pretextual, but not proof of pretext. *Lee*, 226 F.3d at 1253.

After reviewing the record in the present case, we conclude that Ash did not present sufficient evidence for a reasonable jury to find that Tyson discriminated against

him because none of the evidence applicable to his claims establishes discrimination. However, we conclude that Hithon presented a sufficient case of discrimination because he demonstrated that Hatley interviewed him after Hatley had already hired King, indicating that Hatley's stated reasons for rejecting Hithon – his lack of a college degree, his position as a manager at a financially troubled plant, and his lack of experience outside of the Gadsen plant – were pretextual. This evidence of pretext along with Hithon's *prima facie* case of discrimination was sufficient for the jury to decide whether Tyson discriminated. Accordingly, we conclude that the district court did not err in granting Tyson's motion for judgment as a matter of law on Ash's claims, but the court erred in granting the motion for judgment as a matter of law on Hithon's claims.

B. *New Trial*

Because the district court did not err in granting judgment as a matter of law in favor of Tyson on Ash's claims, the issue of whether the court should have alternatively granted a new trial is moot for Ash. However, because we conclude that the district court erred in granting a motion for judgment as a matter of law on Hithon's claims, we turn to his appeal of the district court's alternative grant of a new trial.

On appeal, Hithon argues that the district court erred in alternatively granting Tyson's motion for a new trial because: (1) the court's order provided no basis for its decision, making it impossible for him to appeal specific grounds for the decision or to allow it to be reviewed at the appellate level; (2) the court's decision that the ratio

between the punitive and compensatory damages awards was premature as the court failed to determine back pay and attorney's fees; and (3) he presented sufficient evidence to support the jury's award of compensatory damages. Also, Hithon adopts his district court brief, contesting the district court's decision to grant a new trial.

1. *Standard of Review*

We review a district court's grant of a new trial for an abuse of discretion. *F.D.I.C. v. Stahl*, 89 F.3d 1510, 1514 (11th Cir. 1996). In employing the abuse of discretion standard for granting new trials, we use a more stringent approach. *Id.* The district court "should grant a motion for a new trial when

> the verdict is against the clear weight of the evidence or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. . . . Because it is critical that a judge does not merely substitute his judgment for that of the jury, new trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great – not merely the greater – weight of the evidence."

*Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th Cir. 2001) (internal citations and quotations omitted).

2. *Punitive Damages*

"[P]unitive damages 'are awarded solely to punish defendants and deter future wrongdoing.'" *U.S. E.E.O.C. v. W & O, Inc.*, 213 F.3d 600, 616 (11th Cir. 2000) (quoting

*Walters v. City of Atlanta*, 803 F.2d 1135, 1147 (11th Cir. 1986). We have held that punitive damages are available under § 1981. *See Claiborne v. Illinois Cent. R. R.*, 583 F.2d 143, 154 (5th Cir. 1978);[1] *see also Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 460, 95 S.Ct. at 1720 (stating in dictum that punitives are available in § 1981 actions). Under Title VII, punitive damages are also available if the plaintiff shows the employer "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." *See* 42 U.S.C. § 1981a(b)(1). However, where a plaintiff has both Title VII and 42 U.S.C. § 1981 discrimination claims, the plaintiff is not constrained by the damage caps under Title VII and may recover under § 1981. *See* 42 U.S.C. § 1981a(a)(1), (b)(4). "[A]ny case law construing the punitive damages standard set forth in § 1981a . . . is equally applicable to clarify the common law punitive damages standard with respect to a § 1981 claim." *See Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 441 (4th Cir. 2000).

As a result, punitive damages are available under 42 U.S.C. § 1981 when an "employer has engaged in intentional discrimination and has done so with malice or with reckless indifference to the federally protected rights of an aggrieved individual." *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 529-30, 119 S.Ct. 2118, 2122, 144 L.Ed.2d 494 (1999) (quotation omitted). "'[M]alice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness

[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), we adopted as binding precedent the decisions of the former Fifth Circuit handed down prior to October 1, 1981.

that it is engaging in discrimination." *Id.* at 535, 119 S.Ct. at 2124. "Malice means 'an intent to harm' and recklessness means 'serious disregard for the consequences of [one's] actions.'" *U.S. E.E.O.C. v. W & O, Inc.*, 213 F.3d at 611 (citation omitted) (alteration in original). Intentional discrimination will not rise to the level of maliciousness or recklessness where the employer: (1) is "unaware of the relevant federal prohibition"; or (2) "discriminates with the distinct belief that its discrimination is lawful." *Kolstad*, 527 U.S. at 536-37, 119 S.Ct. at 2125. A plaintiff does not have to show egregiousness or outrageous discrimination to prove punitive damages although this is one form of proof. *Id.* at 538-39, 119 S.Ct. at 2126. Not only must the plaintiff show maliciousness or recklessness, but he must also impute liability to the employer. *Id.* at 539, 119 S.Ct. at 2126. The Supreme Court has held that an employer will not be held liable for punitive damages where "the discriminatory employment decisions of managerial agents . . . are contrary to the employer's good-faith efforts to comply with [42 U.S.C. § 1981]." *See id.* at 545, 119 S.Ct. at 2129 (quotation omitted). In the absence of evidence of a good-faith effort to comply with § 1981, an employer will be liable for actions of its agent when the agent served the employer in a managerial capacity and committed the intentional discrimination at issue while acting in the scope of employment. *See id.* at 542-43, 119 S.Ct. at 2128.

As initial matters, we first conclude that Hithon first cannot adopt arguments from his district court brief contesting Tyson's motion for a new trial. *See Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1167 n. 4 (11th Cir. 2004) ("reject[ing] the practice of incorporating by reference arguments made to district courts, and . . . hold[ing] that [the appellant] . . .

waived the arguments it ha[d] not properly presented for review"). Second, Hithon's argument that the district court failed to give reasons for its decision to grant a new trial as required by Fed. R. Civ. P. 50(c) is without merit because the court stated its reasons by determining that the compensatory and punitive damages awards were "against the great weight of the evidence and [were] outrageously excessive and shocking to the judicial conscience."

We conclude that the district court did not abuse its discretion in granting a new trial on the basis of the jury's punitive damages award because the evidence was insufficient to support an award of punitive damages as Hithon has failed to present any evidence that Hatley knew he was violating federal law when he failed to promote Hithon. Moreover, because Hithon failed to establish that Hatley acted with malice or reckless indifference to his federal rights, we conclude that the district court did not err in granting a new trial on the punitive damages award.

3. *Compensatory Damages*

This court has stated that "[a]lthough compensable damage must be proven, . . . general compensatory damages, as opposed to special damages, need not be proven with a high degree of specificity." *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 476 (11th Cir. 1999). "Compensatory damages may be inferred from the circumstances" or proven through testimony. *Id.* (citation and internal quotation omitted). Evidentiary shortcomings go to the amount of loss, not to the issue of damages. *Id.* Under § 1981, compensatory damages encompass: (1) emotional harms such as humiliation and insult; (2) intangible,

psychological injuries; or (3) financial, property, or physical harms. *Id.* (citations omitted). There is no requirement that emotional damages be proven through medical evidence or expert testimony. *See Kim v. Nash Finch Co.*, 123 F.3d 1046, 1065 (8th Cir. 1997) (holding that "medical or other expert evidence was not required to prove emotional distress and that there was sufficient evidence of emotional distress") (persuasive authority).

After reviewing the record, we conclude that the district court did not abuse its discretion in granting the motion for a new trial on the compensatory damages award because Hithon provided insubstantial evidence to support the jury's $250,000 compensatory damages award.

For the foregoing reasons, we affirm the district court's grant of judgment as a matter of law in favor of Tyson on Ash's discrimination claims. We reverse the district court's grant of judgment as a matter of law in favor Tyson on Hithon's discrimination claims. However with respect to Hithon, we affirm the district court's decision to alternatively grant a new trial because there was insufficient evidence to support the jury's punitive damages award and the compensatory damages award was excessive. We remand this case for the district court to conduct further proceedings consistent with this opinion.

**AFFIRMED IN PART, REVERSED AND REMANDED IN PART.**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

| | | |
|---|---|---|
| ANTHONY ASH,<br>EDDIE BULLOCK,<br>ROBIN DAVENPORT,<br>JOHN HITHON,<br>TRAVIS TANNER, and<br>VIVIAN THORNTON,<br><br>Plaintiffs,<br><br>vs.<br><br>TYSON FOODS, INC.,<br>a corporation, and<br>THOMAS HATLEY, an individual,<br><br>Defendants. | ) | CIVIL ACTION NO.<br>96-RRA-3257-M |

## MEMORANDUM OF DECISION

(Filed Mar. 26, 2004)

The jury found in favor of the remaining plaintiffs, Anthony Ash and John Hithon, on their claims of promotion discrimination, and returned identical awards of compensatory damages in the amount of $250,000.00, and punitive damages in the amount of $1,500,000.00.[1] Before the court is the defendant's Rule 50 motion for judgment as a matter of law on the plaintiffs' discrimination claims,

[1] The question of back-pay was reserved for a bench trial, and the court reserved that matter until ruling on the current motion. The claims of Hithon and Ash in question are the only remaining claims, as the other claims remaining after the court's ruling on the defendants' motion for summary judgment have been dismissed. Defendant Hatley has been dismissed from the case.

their claims for compensatory damages, and their claims for punitive damages (ct. doc. 247). The defendant filed a memorandum of law in support thereof (ct. doc. 254). The plaintiffs filed their opposition (ct. doc. 259) and a supporting brief (ct. doc. 260), to which the defendant filed a reply (ct. doc. 265). At oral argument, the defendant filed a further response addressing the plaintiffs' particular assertions of pretext (ct. doc. 297).

The court has the duty to grant the defendant's motion and dismiss plaintiffs Hithon's and Ash's discrimination claims if the evidence is insufficient to sustain findings that the plaintiffs were passed over for promotion to shift manager because of their race. Although it is the trial evidence which is under consideration, the standard is the same as if the court were considering a motion for summary judgment. The trial transcript allows the evidence presented to the jury to be carefully considered.

## Reasons Given by Hatley for Selecting King and Dade over Hithon

Hatley did not base his promotion decisions on the written qualifications for shift manager. Hatley testified that he based his decisions on these factors: experience in the poultry industry in a successful plant; leadership and organizational skills; experience in more than one plant; having a college degree; and, as the primary consideration, Hatley's belief that it would be better to have as shift managers persons who were not associated with the badly-performing Gadsden facility. With respect to the latter, Hatley strongly relied on what he was told by others (references) in assessing current managers. This was

explained by Hatley, in part, when he testified to what he told an applicant who did not get the job:

> Q. Did you tell him very clearly what the primary reason he didn't get the job was?
>
> A. I most certainly did.
>
> Q. And what was that? What did you tell him?
>
> A. Again, that we had poor performance at Gadsden. We had a group of managers there that admittedly, no issue that they had been in the business for a long time. You call that knowledge, call that experience, whatever. But the numbers were bad. We were losing money.
>
> And, the huge question mark in my mind is what part did their leadership play in the poor performance and, more importantly, why hadn't the leadership help change that.
>
> Q. Now, how long had you had to observe personally the performance of those two guys?
>
> A. Not very long. Again, these two shift managers –
>
> Q. Did you do anything to double check to be sure that maybe in spite of their association, that there might be – you know, that you shouldn't give so much weight to that?
>
> A. Well, again, John Pittard worked with these guys for a long period of time. As a matter of fact, I think, it's also noted. And I asked him. And my concern – the question mark there based on John's reference was not erased.

*Trial Transcript,* pp. 439-40.

## Ash Was Not Considered

Hatley testified that Ash told him at the beginning that he did not think he was ready to be a shift manager, and, therefore, did not consider Ash for either shift manager opening. Ash's evidence, however, is that he told Hatley that he wanted to be considered for the job. As the non-moving party, Ash's version of the evidence must be taken as true. However, it is Ash's position, and the evidence is uncontroverted, that Hatley did not consider Ash for either shift manager opening.[2] Hatley testified:

> THE COURT: Did you say that Ash did not come to you and tell you that he wanted the second slot that came open?
>
> THE WITNESS: He did not.
>
> THE COURT: Did you consider him even though he didn't come to you and say that? Did you still consider him?
>
> THE WITNESS: Sir, after he told me in the office that he was not ready for the shift manager's position, I didn't consider him beyond that.

*Trial Transcript,* p. 456. Why did Hatley not consider Ash? The defendant contends that Hatley simply acted on Ash's statement that he was not ready for the job, while Ash asserts discrimination.

## Law of Pretext

Because it is believed that the evidence supports a finding that the plaintiffs were qualified to be shift

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[2] Nevertheless, the defendant compares and discusses Ash's qualifications.

managers, and because Hatley offered legitimate, non-discriminatory reasons – the factors previously enumerated that Hatley stated he based his decisions on – for selecting King and Dade, who are both white, Hithon must show that these considerations were pretextual. It is incumbent on a plaintiff to show pretext as to each and every reason given by the decision-maker for taking the action complained of. In the context of pretext, Hatley's considerations in selecting King and Dade should be considered as one "reason," as Hatley considered them together and overall, not separately. Together, they are deemed "qualifications."

> Pretext "means a lie, specifically a phony reason for some action." *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir.1995). The question is not whether the employer properly evaluated the competing applicants, but whether the employer's reason for choosing one candidate over the other was honest. *Brill v. Lante Corp.*, 119 F.3d 1266, 1273 (7th Cir.1997). "'Pretext for discrimination' means more than an unusual act; it means something worse than a business error; 'pretext' means deceit used to cover one's tracks." *Clay v. Holy Cross Hosp.*, 253 F.3d 1000, 1005 (7th Cir.2001) (internal citations omitted). Thus, even if IBP's reasons for selecting Harris over Millbrook were "mistaken, ill considered or foolish, so long as [the employer] honestly believed those reasons, pretext has not been shown." Jordan v. Summers, 205 F.3d 337, 343 (7th Cir.2000).

*Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1175 (7th Cir. 2002). The court is "not in the business of adjudging whether employment decisions are prudent or fair. Instead, [its] sole concern is whether unlawful discriminatory animus

motivates a challenged employment decision." *Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.2d 1354, 1361 (11th Cir. 1999). A plaintiff must show not merely that the defendant's employment decisions were mistaken, but that they were in fact motivated by [improper discriminatory reasons]. *Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1253 (11th Cir. 2000). Evidence of pretext might not be enough to prove intentional discrimination:

> [I]f the plaintiff proves at trial that the defendant's proffered reason for its employment decision was false, i.e., pretextual, that is "one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Id.* But "[i]t is not enough to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." *Id.* Thus, as the Supreme Court in *Reeves* stressed, the existence of the prima facie case, coupled with evidence of pretext, is not always enough to satisfy the plaintiff's burden of proving intentional discrimination. *Id.* at 146-47, 120 S.Ct. 2097 ("This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory.").
>
> Applying *Reeves,* we must first consider whether Millbrook presented sufficient evidence of pretext – not because that is dispositive, but because if IBP's asserted justification for selecting Harris were pretextual, that could constitute circumstantial evidence that IBP intentionally discriminated against Millbrook. From there, we

> review the record as a whole to determine whether the evidence in its entirety supports a reasonable inference of race discrimination. *Id.* at 148, 120 S.Ct. 2097.

*Millbrook v. IBP, Inc.*, 280 F.3d at 1174. "[A]n employer would be entitled to judgment as a matter of law . . . if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. at 148. Moreover, the plaintiffs must present evidence that Hatley lied. It is not enough for the factfinder simply to disbelieve Hatley's reasons. "[W]ithout proof of a lie [as to what the employer believed] no inference of discriminatory motive can be drawn." *Millbrook v. IBP, Inc.*, 280 F. 3d at 1181, *quoting Olsen v. Marshal & Ilsley Corp.*, 267 F.3d 597, 602 (7th Cir. 2001).

> [T]his standard is consistent with the plaintiff's ultimate burden of proof in discrimination cases. Such a plaintiff cannot get to a "jury if his only 'evidence' had been that defendants' witnesses were not worthy of belief. That would have made it a no-evidence case, and such a case a plaintiff must lose, because he has the burden of proof." *Equal Employment Opportunity Commission v. G-K-G, Inc.*, 39 F.3d 740, 746 (7th Cir.1994) (internal citations omitted). Rather, "to avoid a directed verdict or a JNOV, a plaintiff must do more than merely argue that the jury might have chosen to disbelieve all of the defendant's evidence. . . . A plaintiff must offer substantial evidence to support the argument." *Perfetti v. First National Bank of Chicago,* 950 F.2d 449, 456 (7th Cir.1991) (internal quotations omitted). Thus, "[a] party cannot meet its burden of proof 'by

> relying on the hope that the jury will not trust the credibility of the witnesses. . . . '" *Id.* (internal citation omitted). Yet that is exactly what Milibrook attempts; he seeks to justify the jury verdict based on his contention that the jury could have disbelieved IBP's assertion that it selected Harris because of his superior qualifications. However, without some affirmative evidence calling into question IBP's credibility, Millbrook must lose. *See also, Fischbach*, 86 F.3d at 1183 ("Title VII liability cannot rest solely upon a judge's determination that an employer misjudged the relative qualifications of admittedly qualified candidates."). Thus, to reconcile this precedent, we must adopt the standard that we have today – that comparative qualifications do not support a finding of pretext – or we would be allowing plaintiffs to reach the jury based solely on a claim that the employer cannot be believed. We have consistently rejected such claims. *See, e.g., Massey v. Blue Cross-Blue Shield of Illinois*, 226 F.3d 922, 926 (7th Cir. 2000) ("It is always possible, of course, that the jury might have disbelieved everything [the employer] said, but we routinely deny summary judgments based on that kind of hope, and consistency requires us also to reject that possibility as a way of saving the jury's verdict.")

*Millbrook v. IBP, Inc.*, 280 F.3d at 1181-82.

The question before the court, then, is whether sufficient evidence was presented at trial to show that Hatley's reason for selecting King and Dade over Hithon was not real, and that his real reason for selecting King and Dade was to deny Hithon promotion because he is black. Ash must show that the evidence is sufficient to find that

Hatley's statement that he did not consider Ash because Ash said he was not ready for the job was pretextual.

## Plaintiffs' Assertions of Pretext

The plaintiffs claim that there are several pieces of evidence tending to establish pretext and intentional discrimination. These assertions are set out in the plaintiffs' opposition brief, and the court will comment on most of them.

### *Qualifications*

Hatley did not base his selections on the written qualifications for shift manager.[3] However, failure to follow policy, without more, is not evidence of discrimination. *Mitchell v. USBI Company,* 186 F.3d 1352, 1355-56 (11th Cir. 1994). In this case, Hatley testified that, although he was aware of Tyson's EEOC policy, he was not aware of the written qualifications for the shift manager position.

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[3] Written qualifications

The written qualifications were set out as follows:

> Education: Requires education beyond high school including special training, vocational school, and/or college course.
> Experience: 3-5 yrs.
>
> Computer Skills: Requires elementary computer skills. For example, checking electronic mail, entering data into document templates, or creating simple queries.
>
> Travel: 1-5 trips/yr.
>
> Special Skills: (none).

The evidence at trial did not explore whether the applicants met all of these written qualifications.

Hithon contends that the fact that he was not selected based on his qualifications alone is evidence of pretext. In *Lee v. GTE Florida, Inc.*, 226 F.3d 1249 (11th Cir. 2000), the Eleventh Circuit set out the law concerning claims of discrimination based on qualifications:

> Other circuits have more clearly articulated the evidentiary burden a plaintiff must meet in order to prove pretext by showing she was substantially more qualified than the person promoted. *See Fulton County*, 207 F.3d at 1340. In *Deines*, for example, the Fifth Circuit affirmed the district court's instruction to the jury stating that "disparities in qualifications are not enough in and of themselves to demonstrate discriminatory intent unless those disparities are so apparent as virtually to jump off the page and slap you in the face." 164 F.3d at 280. The court explained that the phrase
>
> > "jump off the page and slap [you] in the face" . . . should be understood to mean that disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question. This evidentiary standard does not alter the plaintiff's evidentiary burden to prove the fact of intentional discrimination by a preponderance of the evidence. Instead, the standard only describes the character of this particular type of evidence that will be probative of that ultimate fact.
>
> *Id.* at 280-281.

*Lee*, 226 F.3d at 1254. The court held that "[n]one of Lee's proffered evidence established that she was more qualified

than Hines, let alone so clearly more qualified for the position than Hines that a reasonable juror could infer discriminatory intent from the comparison. *Id.* at 1255. Also, it is perfectly acceptable for the decision-maker to base his decision on subjective factors as long as they are subject to objective evaluation. *Chapman v. AI Transport,* 229 F.3d 1012, 1034-35 (11th Cir. 2000). "[I]ndeed, for higher level executive and managerial promotions, subjective factors may play a very substantial role." *Denney v. City of Albany,* 247 F.3d 1172, 1185 (11th Cir. 2001).

The qualifications of Ash, Hithon, King, and Dade, which are stated in the parties' submissions, are set out generally as follows:

Hithon joined the poultry industry in 1982. His work experience was limited to the Gadsden plant, where, as a superintendent for five years, he was responsible for 500-600 people. Hithon had military experience in the National Guard. He did not have a college degree. Comments on Hithon from "higher-ups" were negative.

Ash joined Tyson in 1980. His only experience outside Gadsden was as a member of a group of 12 employees who trained at the Blountsville plant for three months. In 1995, Ash had been a superintendent for just over one year. He supervised a total of 350 workers. Ash helped start the debone operation at the Gadsden plant, and later helped start the IQF department. He did not have a college degree.

King had worked in two successful Arkansas plants, where he had been a shift manager. He did not have a college degree. He was highly recommended, as will be discussed later.

Dade joined Tyson in 1993. He had held numerous positions at the Boaz plant, including Personnel Manager, Production Superintendent, First and Second Shift Superintendent, and Assistant Plant Manager, some of which positions were held simultaneously. He was transferred to Gadsden as maintenance supervisor in May of 1995. He achieved the rank of Lieutenant Colonel after fourteen years in the United States Marine Corps. In addition to a Bachelor's degree, Dade held a Master's Degree in Management and Human Relations.

It is concluded that even if it could be found that Hithon was more qualified than King or Dade, the disparity would not be so great as to allow a finding of discrimination based on the difference. In fact, the evidence shows that King and Dade were more qualified, considering the emphasis Hatley placed on wanting to bring in new management and the recommendations he received.[4] Whether Ash's qualifications were so superior to Dade or King that Hatley, out of a discriminatory intent, wanted to avoid considering Ash by claiming that Ash told him that he was not ready to be a shift manager, and whether other asserted instances of pretext are evidence of such intent, will be discussed later.

*Other Claimed Evidence of Pretext*

The plaintiffs claim that there is certain evidence which establishes racial animus on the part of Hatley and calls into doubt the reasons he gave for not selecting Hithon or considering Ash. The plaintiffs refer to evidence

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[4] Recommendations are discussed, *infra*, pp. 14-15.

that Hatley spoke or ate with whites only. Hatley's testimony that Hithon would come by his office and that they would talk in the office and in the break room about Hithon's military experience and the things he would like to do if he were shift manager was undisputed. This evidence is hardly probative of a racial animus. The plaintiffs also point to the testimony that on one occasion Hatley called Hithon "boy," and on two occasions he called Ash "boy." In a production meeting, Hatley said "Hey, boy" as Hithon was walking through the door. *Trial Transcript,* p. 150. In the cafeteria, Hatley said to Ash, "Boy, you think you've got enough starch in those jeans?" *Trial Transcript,* p. 252. Ash's wife told Hatley that her husband was not a boy, and Hatley laughed. Neither Ash nor Hithon complained about the statements. Even if Hatley made these statements, it cannot be found, without more, that they were racial in nature.

The plaintiffs refer to other alleged evidence of discrimination. They state that at the time in question there had never been a black shift manager at the Gadsden plant. This statement is unsupported with statistical evidence sufficient to allow an inference of discrimination, and is, therefore, meaningless. Moreover, Hatley, the sole decision-maker, had nothing to do with the selection of management personnel before he came to the Gadsden plant.

The plaintiffs claim that the shift manager positions were never posted. Hatley's testimony that he instructed Tyson's resource manager, Ever Higgins, a black woman, to post both openings, is uncontradicted.[5] Certainly the

[5] King and Dade testified that they saw the postings.

plaintiffs knew of the availability of the jobs, whether they were posted or not. Moreover, Hatley talked to them about the openings.

Hithon testified that he was made sanitation superintendent before July, 1985, given more duties than the white person who previously held that position, and then was ignored when credit for the clean-up was given to Dade. Dade testified that Hatley told him that Purdle had complimented Dade as the person mainly responsible for the effort. Hatley, the decision-maker, had nothing to do with the things about which Hithon complains.

The plaintiffs state that Hatley interviewed Hithon and Blake on the same day he hired King. The apparent implication is that Hatley's interviews with Hithon and Blake, black men, were shams, because King had already been hired. In his testimony, Hatley explained that he simply did not record his interviews with Hithon and Blake at the time they were interviewed, which was before King was hired. The evidence shows that Hatley was not always orderly or punctual in his note taking or the recording of his notes, but that is not evidence of discriminatory intent.

There was evidence that Hatley said he was going to work with the superintendents, one of whom was white, for six months, evaluate them, and then fill the second position. However, Dade was given the job less than a month later, which was before Hatley had been on board at Gadsden a full six months. The plaintiffs apparently contend that the fact that Hatley did not wait for six months indicates that he did not intend to give them a fair evaluation. It is just as likely, however, that Hatley, who was told to get the situation in Gadsden corrected as soon

as possible, who was hesitant to hire a manager at the Gadsden plant as a shift manager, and who received negative recommendations on Hithon, simply decided it was not necessary or prudent to wait six months to make a decision. Hatley, of course, was under no obligation to wait six months or any set amount of time to make his decision. Hatley testified to the pressure he was under:

Q. Now, who told you that they wanted you to go in and manage that plant?

A. Well, I was first contacted by Mark. After the interview process, he said I had been selected for the job.

Q. What was the potential future of that plant if it continued to lose the kind of money that it was losing the month you took over?

A. If we continued to lose that kind of money at Gadsden, at some point, Tyson Foods, they would have had to rationalize that plant. They would have had to do a major significant product change or think about closing the plant.

Q. Did that concern you?

A. Sure, it did.

Q. Why?

A. Well, we had twelve to thirteen hundred people whose livelihood depended on working at that plant.

Q. So what was your mission? Did anybody explain to you what your mission was when they sent you to the plant?

A. The first monthly meeting that we had after I came to the plant was shortly after that. It

was made very clear to me by Mr. Purdle in that meeting – again, you know, we're ranking all the plants up there –

MS. WALKER: Judge, we would object to hearsay.

MR. LACY: We don't offer it for the truth, just the fact there was a meeting where he was given – he was given business instructions, Your Honor. I think it's also permissible to show what he was told he was supposed to do in his job.

THE COURT: Overruled.

Q. Go ahead, Mr. Hatley.

A. And, again, in this meeting, Gadsden was pretty well on the lower third on all the parameters you could look at.

MS. WALKER: Objection. It's nonresponsive, Your Honor.

THE COURT: Overruled.

Q. Go ahead, Mr. Hatley.

A. And I remember very distinctly in that meeting Mr. Purdle looking at me and saying, you know, Tom, you don't have long to get this turned around. So that was my mission was to get it turned around.

Q. That was in May, early May or late May?

A. The monthly meeting would have been in May, yes.

Q. Were you periodically reminded of the performance of the plant and the mission?

A. Yes, I was.

Q. Tell the jury some examples of those reminders.

A. Well, certainly Mark Waller, he was my complex manager. We would talk almost daily. But I worked quite a few Saturdays there at the plant. I had quite a bit going on.

There were quite a few Saturdays where Mr. Lovett, who was then the senior vice-president of operations for Tyson, would call me at the plant, and, you know, remind me of what I had to get done and asked me how I was going to get it done, that I didn't have a lot of time to get it done.

*Trial Transcript, pp. 410-13.*

The plaintiffs also state that Hatley said that a college degree was needed, and point out that King did not have one. When asked whether a degree was absolutely required, Hatley testified that "[i]t was a criteria we looked at, a requirement we looked at, but it was not an absolute prerequisite, no." *Trial Transcript* at 438. Lola Hithon, the plaintiff's wife, testified that Hatley was under considerable pressure to improve the ratio of managers at the plant with college degrees but that a degree was not a requirement for promotion. John Hithon himself testified that there was pressure from above to get persons with college degrees, particularly from Mark Waller, the complex manager (manager of several plants).[6] Finally, King was already a shift manager at the Pine Bluff, Arkansas, plant, and, therefore, being awarded the same position at

[6] Hatley advised Hithon to take leadership classes and work on a college degree.

Gadsden would be considered a lateral move, not a promotion.

The plaintiffs even contend that the evidence was disputed as to whether the plant had been losing money. The evidence that the plant was losing money was clear. Even Hithon testified that he would rate the Gadsden plant very much below average for the past two years. In any event, it is without dispute that Hatley was sent to Gadsden for the very purpose of improving the plant's poor financial performance.

Hatley testified that he considered the negative comments about Hithon from John Pittard, a former Gadsden plant manager who had supervised Hithon for eight years. Pittard told Hatley that Hithon's performance was less than standard. Hatley further testified that "John's recommendation was that he would most definitely not recommend, at all, that John [Hithon] works hard, but that he couldn't grasp the whole picture." *Hatley Trial Testimony,* p. 445. In response, Hithon points to a 1990 letter written by Pittard, commending his job performance. Hatley, however, was not even aware of the five-year old letter's existence. On the other hand, Hatley testified that in addition to the fact that King was already working at a successful plant as a shift manager, King had very positive references from Tyson's executive vice-president of operations and senior vice-president of operations. Speaking of King, Hatley testified:

> And, again, the leading factor was that he was a shift manager already in a successful Tyson plant. In making phone calls to ask about Randy, I got recommendations from a number of people, including our executive vice-president

> of operations at the time, and the senior vice-president said, Tom, if you can get this young man, you need to do that.

*Trial Transcript,* p. 446. Hatley also received strong recommendations in favor of Dade. Waller highly recommended him, and the Senior Vice-President of Operations and the Executive Vice-President of Operations both recommended that Dade be given "a shot" as shift manager. *Trial Transcript,* p. 540. Hatley testified that these recommendations had "an awful lot to do with" selecting Dade. *Id.* at 454. Also, based on his observation of Dade's performance at the Gadsden facility, Hatley gave Dade exceptional praise for his work ethic and ability to motivate and lead people.

The plaintiffs state that the fact that Ash provided Dade some training in second processing is by itself reason enough to disbelieve Hatley's "proffered reason for the failure to select Mr. Ash as shift manager."[7] The court disagrees. The fact that Dade received some training from Ash does not contradict the factors Hatley stated he considered, especially his desire to bring in new management and the emphasis he placed on recommendations.[8]

*Conclusion*

It is concluded that the evidence of pretext is insufficient to support a finding that the reasons given by Hatley for making King and Dade shift managers were lies

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[7] As previously discussed, Hatley testified that he did not consider Ash because Ash said that he was not ready for the position.

[8] Any other assertion of discrimination not commented on is no more probative of discrimination than the assertions discussed.

intended to cover-up racial discrimination against Hithon. It is further concluded, assuming that Ash told Hatley that he wanted to be interviewed and considered for shift manager, that the evidence is insufficient to find that Hatley's failure to consider Ash was the result of an intent to discriminate against him. Indeed, Hatley interviewed black managers whom he believed wanted to be considered. Also, Ash's qualifications were not a reason not to consider him, because Hatley could have selected Dade or King over Ash and a comparison of their respective qualifications would not have indicated discrimination. In short, there is an insufficiency of evidence to support a finding of intentional racial discrimination by Hatley against either Hithon or Ash.

Wherefore, Tyson's motion for judgment as a matter of law on Ash's and Hithon's discrimination claims is due to be granted, and those claims are due to be dismissed.[9] A final order in accordance with this memorandum of decision will be entered.

DONE this 26th day of March, 2004.

/s/ Robert R. Armstrong
Robert R. Armstrong, Jr.
United States Magistrate Judge

[9] Dismissal, of course, will moot the jury's verdicts and the need for any further proceedings.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ALABAMA**
**MIDDLE DIVISION**

| | | |
|---|---|---|
| ANTHONY ASH, EDDIE BULLOCK, ROBIN DAVENPORT, JOHN HITHON, TRAVIS TANNER and VIVIAN THORNTON | ) | |
| Plaintiffs, | ) | CIVIL ACTION NO. 96-RRA-3257-M |
| vs. | ) | |
| TYSON FOODS, INC., a corporation; and THOMAS HATLEY, an individual, | ) | |
| Defendants. | ) | |

**ORDER**

(Filed May 18, 2004)

The defendant's Rule 50(b) motion for judgment as a matter of law has been granted. Pursuant to Rule 50(c), the court now alternatively GRANTS the defendant's motion for a new trial. It is determined that the jury's verdict of discrimination is against the great weight of the evidence. It is additionally determined that the evidence does not come close to supporting the amount of the award of compensatory damages or the amount of the award of punitive damages, and that both awards are against the great weight of the evidence and are outrageously excessive and shocking to the judicial conscience.

DONE this 18th day of May, 2004.

/s/ Robert R. Armstrong
Robert R. Armstrong, Jr.
United States Magistrate Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 04-11695-AA

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ANTHONY ASH,
JOHN HITHON,

Plaintiffs-Appellants,

versus

TYSON FOODS, INC.,
a corporation,

Defendant-Appellee.

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On Appeal from the United States District Court for the Northern District of Alabama

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**ON REMAND FROM THE UNITED STATES SUPREME COURT**

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Filed Oct. 2, 2006)

Before: DUBINA, CARNES and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

**District Court Decisions in The Eleventh Circuit Applying The "No Reasonable Person" Standard**

Copeland v. CVS Pharmacy, Inc., 2006 WL 2699045, at *42 (N.D.Ga., Sept. 15, 2006)

English v. CSA Equipment Co., LLC, 2006 WL 2456030, at *14 (S.D.Ala., Aug. 22. 2006)

Davis v. NPC Pizza Hut, 2006 WL 2547667, at *8 (N.D.Ala., Aug. 22, 2006)

Brown v. Marriott Int'l, Inc., 2006 WL 2189695, at *3 (N.D.Ga., July 31, 2006)

Lett v. Reliable Ruskin, 2006 WL 2056582, at *16 (M.D.Ala., July 24, 2006)

Gremillion v. Walgreen Co., Inc., 2006 WL 1794745, at *8-9 (M.D.Ala., June 28, 2006)

Epps v. Walgreen Co., Inc., 2006 WL 1537227, at *4 (M.D.Ala., June 1, 2006)

Brooks v. Dominquez, 2006 WL 1455682, at *9 (N.D.Ga., May 23, 2006)

Autry v. Nassau County School Bd., 2006 WL 1232812, at *9-10 (M.D.Fla., May 6, 2006)

Lockett v. City of Montgomery, 2006 WL 1147295, at *3 (M.D.Ala., May 1, 2006)

Drakeford v. Alabama Cooperative Ext. System, 425 F. Supp. 1274, 1277 (M.D.Ala. 2006)

Haley v. Potter, 2006 WL 861350, at *5 (M.D.Ala., March 31, 2006)

Bailey-Pittman v. UNISIA of Georgia Corp., 2006 WL 871100, at *6 (M.D.Ga., March 31, 2006)

Grimes-Couch v. Trizec-Hahn TBI Silver Springs LLC, 2006 WL 825812, at *2 (N.D.Ga., March 28, 2006)

Garrison v. Montgomery County Bd. of Education, 2006 WL 625876, at *11 (M.D.Ala., March 10, 2006)

Williams v. Fresenius Medical Care North America, Inc., 2006 WL 640515, at *2 (S.D.Ala., March 9, 2006)

Dillahay v. City of Eastpoint, 2006 WL 449179, at *6 n. 12 (N.D.Ga., Feb. 22, 2006)

Labat v. Board of Trustees, Florida A & M University, 2005 WL 3693945, at *5 (N.D.Fla. Dec. 7, 2005)

Twilley v. Burlington Northern & Santa Fe Rwy. Co., 351 F. Supp. 1299, 1307 (N.D.Ala. 2004)

Harrington v. The Children's Psychiatric Center, 2003 WL 23356396, at *10 (S.D.Fla., Feb. 18, 2003)

Dorrego v. Public Health Trust of Miami Dade County, 293 F. Supp. 2d 1274, 1283, 1285-86 (S.D.Fla. 2003)

Green v. Miami-Dade County, 2003 WL 22331877, at *8-9 (S.D.Fla., Sept. 9, 2003)

Gaddis v. Russell Corp., 242 F. Supp. 2d 1123, 1137 (M.D.Ala. 2003)

Rogers-Libert v. Miami-Dade County, 184 F. Supp. 2d 1273, 1280-81 (S.D.Fla. 2001)

Dancy-Pratt v. The School Board of Miami-Dade County, 2001 WL 1922063, at *7-8 (S.D.Fla., Dec. 13, 2001)

Humphrey v. Potter, 162 F. Supp. 2d 1354, 1363 (S.D.Fla. 2001)

Tarrance v. Montgomery Cty. Bd. of Educ., 157 F. Supp. 2d 1261, 1264-65 (M.D.Ala. 2001)

Taylor v. Williams, 2000 WL 1844698, at *3 (S.D.Ala., Oct. 30, 2000)

**District Court Decisions in the Fifth Circuit Applying the "No Reasonable Person" Standard**

Reilly v. TXU Corp., 2006 WL 2586818, at *12 (N.D.Tex. Sept. 8, 2006)

Smith v. O'Keefe, 2006 WL 2167716 *9 (S.D.Tex. July 31, 2006)

Monroe v. Corpus Christi Ind. School Dist., 2006 WL 2092436, at *8 (S.D.Tex. July 26, 2006)

Thomas v. Trico Products Corp., 2006 WL 2092450, at *4-*5 (S.D.Tex. July 25, 2006)

Harris v. Fresenius Medical Care, 2006 WL 2065313, at *14-*15 (S.D.Tex. July 24, 2006)

Blackman v. City of Dallas, 2006 WL 1816390, at *3 (N.D.Tex. July 3, 2006)

Grother v. Union Pacific Railroad Co., 2006 WL 1662936, at *10-*11 (S.D.Tex. June 9, 2006)

Watkins v. Texas Dept. of Criminal Justice, 2006 WL 1581833, at *6-*7 (S.D.Tex. June 6, 2006)

Jackson v. Principi, 2006 WL 1307958, at *7 (S.D.Miss. May 11, 2006)

Sinclair v. Potter, 2006 WL 763629, at *7-*10 (S.D.Tex. March 23, 2006)

Blackwell v. Principi, 2006 WL 181398, at *9-*10 (S.D.Miss. Jan.13, 2006)

Thompson v. Board of Commisioners [sic] of Port of Orleans, 2005 WL 3543776, at *5 (E.D.La. Nov. 7, 2005)

Norwood v. Calpine Corp., 2005 WL 2171883, at *9 (S.D.Tex. Sept. 6, 2005)

Torres v. City of San Antonio, 2005 WL 356950, at *13 (W.D.Tex. Feb. 14, 2005)

Boyce v. Bank of America Technology and Operations, Inc., 2004 WL 2545015, at *5-*6 (N.D.Tex. Nov. 10, 2004)

Butler v. Munsch Hardt Kopf & Harr, P.C., 2004 WL 2468964, at *6 (N.D.Tex. Nov. 1, 2004)

Nelson v. Bank of America, 2004 WL 942238, at *9 (N.D.Tex. April 30, 2004)

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Reynolds v. City of Dallas, 2004 WL 893425, at *8 (N.D.Tex. April 23, 2004)

Owens v. Excel Mgt. Services, Inc., 2004 WL 358153, at *9 (N.D.Tex. Feb. 13, 2004)

Mayes v. Office Depot, Inc., 292 F. Supp. 2d 878, 891 (W.D.La. Sept. 19, 2003)

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Chustz v. City of New Orleans, 2002 WL 31556353, at *10-*11 (E.D.La. Nov. 15, 2002)

Jerge v. City of Hemphill, Texas, 224 F. Supp. 2d 1086, 1093-94 (E.D.Tex. 2002)

Kokes v. Angeline College, 220 F. Supp. 2d 661, 666-67 (E.D.Tex. 2002)

Daniels v. Home Depot, Inc., 2002 WL 1398643, at *10 (E.D.La. June 26, 2002)

Mahaffey v. Mississippi Dept. of Wildlife, 2002 WL 1611504, at *4-*5 (N.D.Miss. June 20, 2002)

Gant v. Sabine Pilots, 204 F. Supp. 977, 988-99 (E.D.Tex. 2002)

Murphree v. Potter, 226 F. Supp. 2d 826, 836-37 (N.D.Miss. 2002)

McVicker v. Albemarle Corp., 2000 WL 1034541, at *6-*7 (M.D.La. June 26, 2000)

**District Court Decisions in the Seventh Circuit Applying the "No Reasonable Person" Standard**

Metty v. Motorola, Inc., 2006 WL 2916822, at *10 (N.D.Ill. Oct. 10, 2006)

Coolidge v. Consolidated City of Indianapolis, 2006 WL 2540314, at *12 (S.D.Ind. Aug. 30, 2006)

Currie v. Paper Converting Machine Co., 2006 WL 1117797, at *3 (E.D.Wis. April 24, 2006)

Goodum v. White, 2006 WL 566469, at *21 (N.D.Ill. March 3, 2006)

Nowak v. International Truck and Engine Corp., 406 F. Supp. 2d 954, 966 (N.D.Ill., Dec. 19, 2005)

Jones v. City of Milwaukee, 2005 WL 3274338, at *5 n.3 (E.D.Wis. Dec. 1, 2005)

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Knowles v. Trans Union, LLC, 2005 WL 3159363, at *12 (N.D.Ill. Nov. 21, 2005)

EEOC v. Northcentral Technical College District Board of Trustees, 2005 WL 2840339, at *6 (W.D.Wis. Oct. 26, 2005)

Kabes v. School Dist. of River Falls, 387 F. Supp. 2d 955, 972 (W.D.Wis. 2005)

Patmythes v. The City of Janesville, 373 F. Supp. 2d 924, 938 (W.D.Wis. 2005)

Townsend v. Weyerhaeuser, 2005 WL 1389197, at *13 (W.D.Wis. June 13, 2005)

Wright v. Richmond Power and Light, 2005 WL 1025769, at *3 (S.D.Ind. April 21, 2005)

Cavaliero v. First USA Bank, 2004 WL 1900000, at *7 (N.D.Ill. Aug. 23, 2004)

Terry v. Bank One, Inc., 2004 WL 1103011, at *8 (S.D.Ind. May 17, 2004)

Williams v. United Technologies Carrier Corp., 310 F. Supp. 2d 1002, 1016-17 (S.D.Ind. 2004)

Blise v. Antaramian, 2004 WL 3708454, at *13 (E.D.Wis. March 8, 2004)

Cole v. Greater Clark County Schools, 2004 WL 350446, at *12 (S.D.Ind. Jan. 16, 2004)

Wells-Fenton v. Mineta, 2003 WL 23220054, at *12 (S.D.Ind. Dec. 30, 2003)

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Myles v. City of Indianapolis, 213 F. Supp. 2d 962, 967 (S.D.Ind. 2002)

FILED

No. 06-706

IN THE

# Supreme Court of the United States

ANTHONY ASH AND JOHN HITHON,

*Petitioners,*

v.

TYSON FOODS, INC.,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Whether the test the Eleventh Circuit used to assess petitioners' "comparative qualifications" claim (*i.e.*, a claim in which a Title VII plaintiff relies solely on his or her superior qualifications to establish that an employer's reasons for a challenged promotion decision are pretextual), following instructions provided by this Court in *Ash* v. *Tyson Foods, Inc.*, __ U.S. __, 126 S. Ct. 1195 (2006) (*per curiam*), conflicts with the test used in other circuits, which uniformly require a showing of *markedly* superior qualifications, and employ a variety of substantively indistinguishable verbal formulations to express this requirement;

Whether this case is an appropriate vehicle for addressing any conflict, in view of the fact that petitioners did not argue that they were more qualified under the criteria the employer actually used to assess candidates, but rather that they were more qualified under the criteria they believe should have been used; and

Whether the Eleventh Circuit's unpublished, non-precedential, and fact-bound decision – holding that the District Court did not err in deciding that the totality of evidence presented at trial would not, as a matter of law, allow a reasonable jury to conclude that petitioner Ash satisfied his burden of proving that he was not hired on account of race, but that petitioner Hithon was entitled to a new trial – was erroneous.

## RULE 26.9 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that IBP, Inc., currently known as Tyson Fresh Meats, Inc., is a subsidiary of Tyson Foods, Inc. (NYSE: TSN).

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| RULE 26.9 STATEMENT | ii |
| TABLE OF AUTHORITIES | iv |
| BRIEF IN OPPOSITION | 1 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR DENYING THE WRIT | 9 |
| I. ALL CIRCUITS APPLY THE SAME BASIC STANDARD TO PRETEXT CLAIMS BASED ON COMPARATIVE QUALIFICATIONS, AND THE ELEVENTH CIRCUIT'S STANDARD IS CONSISTENT. | 9 |
| A. The Eleventh Circuit applied the appropriate standard on remand. | 9 |
| B. There is no conflict among the circuits regarding the applicable standard for comparative qualification claims. | 10 |
| II. EVEN IF THERE WERE SUBSTANTIVE DIFFERENCES AMONG THE CIRCUITS, THIS CASE IS AN INAPPROPRIATE VEHICLE FOR ADDRESSING THE ISSUE. | 24 |
| III. THE ELEVENTH CIRCUIT'S EVALUATION OF THE ALLEGEDLY BIASED REMARKS IN THIS CASE WAS PROPER. | 25 |
| CONCLUSION | 30 |

TABLE OF AUTHORITIES

Page

CASES

*Aka* v. *Washington Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) ..... 13, 17, 19

*Anderson* v. *City of Bessemer City*, 470 U.S. 564 (1985) ..... 26

*Anderson* v. *Westinghouse Savannah River Co.*, 406 F.3d 248 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1431 (2006) ..... 12

*Ash* v. *Tyson Foods, Inc.*, __ U.S. __, 126 S. Ct. 1195 (2006) ..... 6, 7, 8, 10

*Bender* v. *Hecht's Dep't Stores*, 455 F.3d 612 (6th Cir. 2006) ..... 13, 16, 17, 19, 24

*Bray* v. *Marriott Hotels*, 110 F.3d 986 (3d Cir. 1997) ..... 17, 18, 19

*Bullington* v. *United Air Lines, Inc.*, 186 F.3d 1301 (10th Cir. 1999) ..... 12, 13, 19

*Byrnie* v. *Town of Cromwell*, 243 F.3d 93 (2d Cir. 2001) ..... 11, 12, 19

*Cooper* v. *Southern Co.*, 390 F.3d 695 (11th Cir. 2004), *cert. denied*, 126 S. Ct. 478 (2005) ..... 10, 17

*Cornwell* v. *Electra Cent. Credit Union*, 439 F.3d 1018 (9th Cir. 2006) ..... 23

*David* v. *Caterpillar, Inc.*, 324 F.3d 851 (7th Cir. 2003) ..... 19, 20

*Dennis* v. *Columbia Colleton Med. Ctr.*, 290 F.3d 639 (4th Cir. 2002) ..... 13, 17, 19

*Duffy* v. *Wolle*, 123 F.3d 1026 (8th Cir. 1997) ..... 12

*Ezold* v. *Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509 (3d Cir. 1992) ..... 12

*Fischbach* v. *D.C. Dep't of Corr.*, 86 F.3d 1180 (D.C. Cir. 1996) ..... 12

*Glenn's Trucking Co.* v. *N.L.R.B.*, 298 F.3d 502 (6th Cir. 2002) ..... 23

TABLE OF AUTHORITIES – continued

Page

*Godwin* v. *Hunt Wesson, Inc.*, 150 F.3d 1217 (9th Cir. 1998) ..... 23

*Jenkins* v. *Nashville Public Radio*, 106 Fed. App'x 991 (6th Cir. 2004) ..... 16, 17

*Lee* v. *GTE Fla., Inc.*, 226 F.3d 1249 (11th Cir. 2000) ..... 15, 19

*Lindahl* v. *Air France*, 930 F.2d 1434 (9th Cir. 1991) ..... 23

*Margolis* v. *Tektronix, Inc.*, 44 Fed. App'x 138 (9th Cir. 2002) ..... 15, 16

*Millbrook* v. *IBP*, 280 F.3d 1169 (7th Cir. 2002) ..... 12, 13, 20

*Odima* v. *Westin Tucson Hotel*, 53 F.3d 1484 (9th Cir. 1995) ..... 13, 14, 16, 17

*Peters* v. *Lieuallen*, 746 F.2d 1390 (9th Cir. 1984) 12

*Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989) ..... 11

*Raad* v. *Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185 (9th Cir. 2003) ..... 14, 15, 16

*Rathbun* v. *Autozone, Inc.*, 361 F.3d 62 (1st Cir. 2004) ..... 11, 12, 19

*Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) ..... 24, 25

*Scott* v. *Univ. of Miss.*, 148 F.3d 493 (5th Cir. 1998), *abrogated in part on other grounds by Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62 (2000) ..... 12, 13

*Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248 (1981) ..... 10, 11, 21

*Tucevich* v. *Nevada*, No. 97-16713, 1999 WL 62735 (9th Cir. Jan. 22, 1999) ..... 15

*Wilson* v. *B/E Aerospace, Inc.*, 376 F.3d 1079 (11th Cir. 2004) ..... 12

TABLE OF AUTHORITIES – continued

Page

*Zambetti* v. *Cuyahoga Cmty. Coll.*, 314 F.3d 249 (6th Cir. 2002) ..... 23

RULES

6th Cir. I.O.P. R. 206(c) ..... 16

9th Cir. Local R. 36-3(a) ..... 15

## BRIEF IN OPPOSITION

The petition should be denied because the Eleventh Circuit's unpublished and non-precedential decision raises no important question of federal law warranting this Court's review.

First, there is no conflict in the lower courts over the standard that applies to "comparative qualifications" claims – *i.e.*, claims in which a Title VII plaintiff relies solely on his or her qualifications to establish that an employer's reasons for a challenged promotion decision are a pretext for unlawful discrimination. In such cases, the courts of appeals uniformly require plaintiffs to show that their qualifications were *markedly* superior to those of the selected candidate. That the courts of appeals use different language to express this standard is not (contrary to petitioners' argument) evidence of a "circuit split." Indeed, the Eleventh Circuit's standard – that "disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question" – is the same as, or merely a semantic variation on, the standards employed by the First, Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia Circuits.

Second, even if there were any substantive differences between the courts of appeals' standards, this case is an inappropriate vehicle for addressing the issue: Petitioners' real claim is that they were more qualified under the hiring criteria that they believe *should have been used*, not those that were actually used. Petitioners are thus making a "deviation from company policy" claim, not a "superior qualifications" claim.

Third, the Eleventh Circuit's evaluation of the District Court's holding in this case (*i.e.*, that the totality of the evidence at trial was insufficient, as a matter of law, to allow

a reasonable jury to conclude that petitioners satisfied their burden of proving that they were not promoted because of their race) was proper. This fact-bound determination, relying on well established standards of review in an unpublished, non-precedential opinion, does not create a conflict among the circuits, and does not otherwise warrant this Court's review.

## STATEMENT OF THE CASE

Six plaintiffs, including petitioners Anthony Ash and John Hithon, filed a complaint that included claims of racial discrimination against Tyson Foods, Inc. ("Tyson" or "respondent"), under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. The District Court granted Tyson's motion for summary judgment as to all claims asserted by Ash and Hithon, except for their claims that they were discriminatorily denied promotions to Shift Manager positions in the Tyson plant in Gadsden, Alabama, in the Summer of 1995.

Petitioners' promotion claims were tried to a jury. Much evidence was presented about the financial status of the Gadsden plant. It was undisputed that the Gadsden plant was losing money (as much as $250,000 a week) and had been doing so for approximately two years.[1] Plant Manager Tom Hatley was assigned to the Gadsden plant with the specific instruction to "turn the plant around." One of Hatley's first actions as Plant Manager was to withhold wage increases for his two Shift Managers (both of whom were white), which caused both to resign and created the openings at issue in this case. Hatley had concerns over filling the vacant positions

[1] Petitioners argued that the plant was not in financial straits, but offered absolutely no evidence to support their argument other than Hithon's speculation: "I believe the plant was making money. . . . Because the plant was still running, and we had a job to go to everyday." (Tr. 163). Hithon admitted that he had no actual knowledge of the Gadsden plant's "bottom line." (Tr. 132, 198-99).

with persons who were members of management at the Gadsden plant during its declining financial performance, and stated that this was a principal consideration throughout the process. As for Hithon and Ash, who had both worked as Shift Superintendents (a position below Shift Manager) through the declining years, Hatley was concerned as to "what part did their leadership play in the poor performance."

The District Court made the following finding about Hatley's decision making:

> Hatley testified that he based his decisions on these factors: experience in the poultry industry in a successful plant; leadership and organizational skills; experience in more than one plant; having a college degree; and, as the primary consideration, Hatley's belief that it would be better to have as shift managers persons who were not associated with the badly-performing Gadsden facility. With respect to the latter, Hatley strongly relied on what he was told by others (references) in assessing current managers.

Pet. App. 23a.

Hatley ultimately selected two persons who had no connection to the leadership of the poorly performing Gadsden plant. Randy King was already a successful Shift Manager at another plant. Although he did not have a college degree, he came highly recommended by a Tyson Senior Vice President. Steve Dade transferred to Gadsden after Hatley arrived, having previously served in several capacities, including Assistant Plant Manager, at another plant. He was a former Lieutenant Colonel in the United States Marine Corps, had a master's degree in management and human relations, and won the approval of higher management at the Gadsden plant by virtue of his successful performance in special assignments. Like King, Dade received glowing

recommendations from his Complex Manager and two Tyson executives.

In contrast, one of Hithon's former Plant Managers, who had supervised Hithon for about eight years, advised Hatley that he "would most definitely not recommend" that Hithon be placed in the position. (Tr. 444-45). Hatley noted as additional negative considerations under his hiring criteria that Hithon had no experience outside the Gadsden plant and that he did not have a college degree. As for Ash, his only experience outside the Gadsden plant was his participation in a three-month training program at another plant. He had been a Shift Superintendent for only about one year, and did not have a college degree. Ash and Hithon were part of the Gadsden plant's management during its period of poor performance.

Petitioners sought to prove that Hatley's stated reasons for hiring Dade and King were pretextual. They argued at trial, in the Court of Appeals, and now here that their preferred criteria (seniority and experience in the Gadsden plant) should have been used in hiring the Shift Managers, and not the criteria Hatley actually used. Petitioners argued that Hatley's failure to follow a Tyson job description for the shift manager job was evidence of pretext. It is undisputed, however, that Hatley was not aware of that job description, and the criteria he used related closely to his mandate to improve the management of the plant. Petitioners also argued that Hatley did not follow two Tyson policies (the Seniority Policy and the Salary Administration Policy). Both policies, however, gave Hatley discretion to deviate from their requirements if there were important business reasons for doing so.

Hithon also argued that pretext was established in his case because Hatley's notes of Hithon's job interview appear in Hatley's Day-Timer on a date one day after the entry that reflects that the candidate selected (King) had accepted the offer. The District Court found, however, that "[t]he evidence shows that Hatley was not always orderly or punctual in his

note taking or the recording of his notes, but that is not evidence of discriminatory intent." Pet. App. 35a.

Petitioners also pointed to three occasions when Hatley allegedly referred to Hithon or Ash using the ambiguous term "boy," which petitioners perceived as racist comments: "Hey, boy;" "Boy, we've got to get going;" and, "Boy, you think you've got enough starch in those jeans. All you need is a pair of cowboy boots to go with it." (Tr. 148-50, 252, 284). Petitioners offered no evidence that Hatley had ever used any racial epithets or other comments that could be considered evidence of discrimination. (Tr. at 284). Both admitted, moreover, that Hatley was rude in his dealings with all workers, white and black. (Tr. at 151-52).

The case was submitted to the jury, and the jury ruled in favor of petitioners and awarded each $250,000 in compensatory damages and $1.5 million in punitive damages. Thereafter, Tyson filed post-trial motions requesting judgment as a matter of law and, in the alternative, a new trial. The District Court granted these motions, and found that the totality of evidence presented at trial would not allow a reasonable jury to conclude that petitioners satisfied their burden of proving that the reasons offered by Hatley for his decision were pretexts for intentional racial discrimination. Pet. App. 40a-42a.

On appeal to the Eleventh Circuit, petitioners pressed the same arguments they made to the District Court. The Eleventh Circuit affirmed in an unpublished, non-precedential *per curiam* opinion. It noted that an employer is "entitled to judgment as a matter of law where 'the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.'" Pet. App. 13a (quoting *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000)). It concluded that (1) the evidence of Hatley's isolated use of the word "boy" in conversations with Hithon and Ash was not evidence of racial

discrimination because it was not "modified by a racial classification like 'black' or 'white'"; (2) Hatley's deviation from company policy was not circumstantial evidence of racial discrimination unless "the rules were bent or broken to give a non-minority applicant an advantage"; and (3) the appellants failed to prove, based solely on their comparative qualifications for the job, that the hiring decision was pretextual, because "[p]retext can be established through comparing qualifications only when the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face." Pet. App. 14a-15a (internal quotation marks omitted).

The Eleventh Circuit decided, however, that Hithon presented sufficient evidence of pretext insofar as he proved that Hatley's notes in his Day-Timber regarding Hithon's interview appear on the page dated July 25, whereas the notes reflecting King's acceptance of the job appear on the page dated July 24. The Court thus affirmed judgment as a matter of law on Ash's claims, and remanded for a new trial on Hithon's claims (because, even though Hithon offered sufficient evidence to allow the jury to find pretext, there was insufficient evidence in the record to support the jury's award of compensatory and punitive damages).[2]

Ash and Hithon then petitioned this Court for a writ of certiorari. This Court granted the writ and, in a *per curiam* opinion, vacated the Eleventh Circuit's decision and remanded the case to the Court of Appeals for clarification. See *Ash* v. *Tyson Foods, Inc.*, __ U.S. __, 126 S. Ct. 1195 (2006) (*per curiam*). This Court noted that though "[t]he judgment of the Court of Appeals, and the trial court rulings it affirmed, may be correct in the final analysis," there were two errors in the Eleventh Circuit's analysis that merited vacatur. *Id.* at 1196.

---

[2] Petitioners do not challenge the Court of Appeals' holding that Hithon is entitled to a new trial.

First, the Eleventh Circuit erred "[i]nsofar as [it] held that modifiers or qualifications are necessary in all instances to render the disputed term ["boy"] probative of bias." *Id.* at 1197. Rather, the word "boy" can be a racial epithet depending on "context, inflection, tone of voice, local custom, and historical usage." *Id.* Second, this Court concluded that the Eleventh Circuit's use of a colloquial expression ("so apparent as virtually to jump off the page and slap you in the face") as a legal standard for determining when comparative qualifications evidence alone is sufficient to establish pretext was "unhelpful and imprecise." *Id.* This Court observed that the Eleventh Circuit and other courts of appeals have articulated better standards, and noted specifically the Eleventh Circuit's standard in *Cooper* v. *Southern Co.*: "'[D]isparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.'" *Ash*, 126 S. Ct. at 1197 (quoting *Cooper* v. *Southern Co.*, 390 F.3d 695, 732 (11th Cir. 2004), *cert. denied*, 126 S. Ct. 478 (2005)).

Notably, this Court explained that its decision "should not be read to hold that petitioners' evidence necessarily showed pretext. The District Court concluded otherwise. It suffices to say here that some formulation other than the test the Court of Appeals articulated in this case would better ensure that trial courts reach consistent results." *Id.* at 1198. The Court remanded the case to the Eleventh Circuit to "determine in the first instance whether the two aspects of its decision here determined to have been mistaken were essential to its holding." *Id.*

On remand, the Eleventh Circuit considered carefully this Court's opinion and concluded that the two errors identified were not essential to its holding. In another unpublished, non-precedential *per curiam* opinion, the Eleventh Circuit explained that the lack of a racially specific modifier for Hatley's "boy" comments was not essential to its conclusion

that the District Court held properly that Ash and Hithon had not proved pretext based on those comments. Rather, the Court explained that the evidence at trial showed that the "boy" comments were "ambiguous stray remarks not uttered in the context of the decisions at issue," and to the extent they were circumstantial evidence of bias, they were insufficient, in light of the other evidence produced at trial, "to provide a reasonable basis for a finding of racial discrimination in the denial of the promotions." Pet. App. 5a. The Eleventh Circuit noted that the statements "were remote in time to the employment decision, totally unrelated to the promotions at issue, and showed no indication of general racial bias in the decision making process at the plant or by Hatley," and their probative value was thus limited by context. *Id.* The District Court did not, therefore, err in concluding that the alleged remarks were "insufficient evidence of bias in the circumstances of this case to overcome the articulated reasons for Hatley's decision." *Id.*

The Eleventh Circuit also explained that its use of the colloquial "slap you in the face" expression was not essential to its holding. The Court relied instead on the standard it announced in *Cooper* (cited with approval by this Court in *Ash*, see 126 S. Ct. at 1197), and concluded that the District Court did not err in finding that Ash and Hithon "did not meet their burden . . . to show that the disparities between their qualifications and the qualifications of King and Dade were 'of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.'" Pet. App. 7a (quoting *Cooper*, 390 F.3d at 732). Thus, while their qualifications could be probative, petitioners could not rely solely on their qualifications to prove pretext. The Court of Appeals reiterated that the uncontested evidence at trial proved that King and Dade were *better* qualified than Ash or Hithon under the relevant criteria: they "were not associated with the prior poor performance of the plant, they had

demonstrated leadership and management skills, they had superior recommendations, and they had experience in the poultry industry at more than one Tyson plant. The only negative – King's lack of a college degree – made him equally, but not less, qualified educationally than the plaintiffs." *Id.* at 5a-6a.

Petitioners now seek a second writ of certiorari.

## REASONS FOR DENYING THE WRIT

There is no split in the circuits on either of the questions posed in the petition, nor was the Eleventh Circuit's decision erroneous in any respect. Rather, the Eleventh Circuit hewed carefully to this Court's instructions on remand, and there is simply no reason for this Court to re-review this case. The lower courts' fact-bound determinations, which are based on settled legal principles and set forth in unpublished and non-precedential opinions, do not warrant review.

### I. ALL CIRCUITS APPLY THE SAME BASIC STANDARD TO PRETEXT CLAIMS BASED ON COMPARATIVE QUALIFICATIONS, AND THE ELEVENTH CIRCUIT'S STANDARD IS CONSISTENT.

Petitioners contend that review is warranted for two reasons: (1) the Eleventh Circuit supposedly used the same standard to judge their comparative qualification claims on remand that this Court rejected in *Ash*, and (2) there is a purported conflict among the courts of appeals as to the proper standard to apply to this type of claim. Neither proposition is correct.

#### A. The Eleventh Circuit applied the appropriate standard on remand.

Petitioners assert that the Eleventh Circuit's use of the *Cooper* standard on remand was "intransigent" because that standard is not "substantively different from the 'slap in the

face' standard rejected by this Court in *Ash*." Pet. at 10, 12. This is simply incorrect. Far from being "intransigent," the Court of Appeals did precisely what this Court instructed it to do: it abandoned its use of a colloquial expression as a legal standard and relied instead on a standard that "would better ensure that trial courts reach consistent results," *Ash*, 126 S. Ct. at 1198 – *i.e.*, the standard articulated in *Cooper*, which this Court cited as one of the alternative formulations the Eleventh Circuit could have used. Even if the Eleventh Circuit used the "slap you in the face" phrase in the past as a shorthand way of referring to the *Cooper* standard, see, *e.g.*, *Cooper*, 390 F.3d at 732, there is no question that it has stopped using the phrase as a legal standard in accord with this Court's instructions, and applied a proper standard (which this Court itself identified) on remand in this case.

### B. There is no conflict among the circuits regarding the applicable standard for comparative qualification claims.

Following the guidance of this Court, the courts of appeals uniformly recognize that a Title VII plaintiff who seeks to establish pretext based *solely* on evidence of comparative qualifications must show that his or her qualifications were *markedly* superior to those of the candidate selected for a job or promotion. Although the lower courts have used different phrases to capture this concept, there is no meaningful difference between their various verbal formulations, and the Eleventh Circuit's *Cooper* standard is no exception.

1. All of the courts of appeals that have addressed the issue have concluded that a factfinder cannot base a finding of pretext solely on evidence of comparative qualifications unless the plaintiff establishes that his or her qualifications were markedly superior to those of the candidate who was hired. This requirement is compelled by this Court's recognition that Title VII "was not intended to diminish traditional management prerogatives." *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 259 (1981) (internal

quotation marks omitted). Accordingly, "[t]he fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of . . . pretext[]." *Id.*; see also *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 243 (1989) ("[T]he very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color." (internal quotation marks and citations omitted)).

In compliance with these instructions, the courts of appeals seek to ensure that courts and juries do not act as "super personnel departments" that second guess good faith business judgments. Because it is in the employer's interest to select the most qualified applicant, an employer's judgment about qualifications is assumed to be made in good faith.

As the First Circuit has explained,

> in the absence of strong objective evidence (e.g., test scores), proof of competing qualifications will seldom, in and of itself, be sufficient to create a triable issue of pretext. . . . This result follows from a form of the business judgment rule. . . . Qualifications are notoriously hard to judge and, in a disparate treatment case, more must be shown than that the employer made an unwise personnel decision by promoting "X" ahead of "Y." . . . In other words, subjective evidence of competing qualifications seldom provides a principled way for a factfinder to determine whether a given employment decision, even if wrong-headed, was anything more than a garden-variety mistake in corporate judgment.

*Rathbun* v. *Autozone, Inc.*, 361 F.3d 62, 74 (1st Cir. 2004) (internal quotation marks and citations omitted); see also *Byrnie* v. *Town of Cromwell*, 243 F.3d 93, 103 (2d Cir. 2001) ("[T]he court must respect the employer's unfettered

discretion to choose among qualified candidates (. . . and not to act as a super personnel department that second guesses employers' business judgments)." (internal quotation marks and citations omitted)); *Ezold* v. *Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 527 (3d Cir. 1992) (same); *Anderson* v. *Westinghouse Savannah River Co.*, 406 F.3d 248, 272 (4th Cir. 2005), *cert denied*, 126 S. Ct. 1431 (2006) (same); *Scott* v. *Univ. of Miss.*, 148 F.3d 493, 509 (5th Cir. 1998), *abrogated in part on other grounds by Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62 (2000) (same); *Millbrook* v. *IBP*, 280 F.3d 1169, 1181 (7th Cir. 2002) (same); *Duffy* v. *Wolle*, 123 F.3d 1026, 1038 (8th Cir. 1997) (same); *Peters* v. *Lieuallen*, 746 F.2d 1390, 1393 (9th Cir. 1984) (same); *Bullington* v. *United Air Lines, Inc.*, 186 F.3d 1301, 1318 n.14 (10th Cir. 1999) (same); *Wilson* v. *B/E Aerospace, Inc.*, 376 F.3d 1079, 1092 (11th Cir. 2004) (same); *Fischbach* v. *D.C. Dep't of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (same).

2. Accordingly, to prevent second-guessing of presumptively good faith business decisions, the courts have insisted that plaintiffs who seek to show pretext based *solely* on a comparison of qualifications must demonstrate that their own qualifications were markedly superior. The lower courts have expressed this requirement in different ways, but their expressions all serve the same purpose, and do not differ in substance. The First Circuit requires that a plaintiff's "qualifications [be] *so obviously superior* to those of the successful . . . applicants as to undermine the legitimacy of the selection process." *Rathbun*, 361 F.3d at 75 (emphasis added). The Second Circuit requires that a "plaintiff's credentials . . . be *so superior . . . that 'no reasonable person in the exercise of impartial judgment, could have chosen the candidate selected.'*" *Byrnie*, 243 F.3d at 103 (quoting *Deines* v. *Tex. Dep't of Protective & Regulatory Servs.*, 164 F.3d 277, 280-81 (5th Cir. 1999)) (emphasis added). In the Fourth Circuit, a plaintiff must have "qualifications . . . so *plainly superior* that the employer *could not have preferred*

*another candidate*." *Dennis* v. *Columbia Colleton Med. Ctr.*, 290 F.3d 639, 648 n.4 (4th Cir. 2002) (emphases added). The Fifth Circuit, in addition to using the standard in *Deines* quoted above, has explained that there must be a "'*glaring distinction*' that would reasonably support a conclusion that [the plaintiff] was *clearly* better qualified" than the applicant selected. *Scott*, 148 F.3d at 509 (emphases added). The Sixth Circuit requires that "the rejected applicant's qualifications must be *so significantly better* than the successful applicant's qualifications that *no reasonable employer would have chosen the latter applicant over the former*." *Bender* v. *Hecht's Dep't Stores*, 455 F.3d 612, 627 (6th Cir. 2006) (emphases added). The Seventh Circuit requires "differences [that] are so favorable to the plaintiff *that there can be no dispute among reasonable persons* of impartial judgment that the plaintiff was *clearly* better qualified." *Millbrook*, 280 F.3d at 1179 (internal quotation marks omitted) (emphases added). In the Ninth Circuit, the "plaintiff's qualifications [must be] *clearly superior* to the qualifications of the applicant selected." *Odima* v. *Westin Tucson Hotel*, 53 F.3d 1484, 1492 (9th Cir. 1995) (emphasis added). The Tenth Circuit has held that "the disparity in qualifications must be '*overwhelming*' to be evidence of pretext." *Bullington*, 186 F.3d at 1319 (10th Cir. 1999) (citation omitted) (emphasis added). And the District of Columbia Circuit requires that "a reasonable employer would have found the plaintiff to be *significantly better qualified* for the job." *Aka* v. *Washington Hosp. Ctr.*, 156 F.3d 1284, 1294 (D.C. Cir. 1998) (*en banc*) (emphasis added).

The Eleventh Circuit's standard does not conflict with the foregoing formulations. It is instead largely identical to the tests used by the Second, Fourth, Fifth, Sixth and Seventh Circuits, and is the same substantively as those in the First, Ninth, Tenth, and District of Columbia Circuits. All of these courts require that a plaintiff who relies solely on his

qualifications as evidence of pretext prove he was markedly better qualified for the job than the applicant who was hired.

3. Just as they did in their first petition, petitioners attempt to manufacture a conflict from variations in the foregoing language. They ignore the standards applied by the First, Second, and Tenth Circuits, and try to group the remaining circuits on a spectrum they have invented based on supposed variations in the restrictiveness of the different courts' approaches: the Third, Fourth, and District of Columbia Circuits employ "intermediate standards," Pet. at 11, that fall between the supposed poles of the Fifth and Eleventh Circuits (as the most restrictive) and the Sixth and Ninth Circuits (as the least restrictive), with the Seventh Circuit using an unusual "hybrid approach." *Id.* at 21.

This effort suffers from three fundamental flaws: (1) petitioners' groupings of the circuits are arbitrary, as the circuits apply substantively the same standard; (2) petitioners completely misunderstand (or ignore) the distinction between plaintiffs who seek to prove pretext based *solely* on their qualifications, and those who use qualifications as one *type* of probative evidence, often comparing cases between these two distinct categories as a way of demonstrating a supposed "circuit split"; and (3) petitioners assume the circuits employ different standards based on differences in the number of published opinions in which plaintiffs have succeeded, and then compound this error by making the circular argument that the different standards are "outcome determinative."

a. Neither the Sixth Circuit nor the Ninth Circuit allow the freewheeling use of comparative qualification evidence that petitioners suggest. In the Ninth Circuit, a plaintiff who seeks to establish pretext based solely on his qualifications must prove that his "qualifications [are] *clearly superior* to the qualifications of the applicant selected." *Odima*, 53 F.3d at 1492 (emphasis added). Petitioners cite *Raad* v. *Fairbanks North Star Borough School District*, 323 F.3d 1185 (9th Cir. 2003), but do not explain how that case is

evidence of a lesser standard; indeed, the Court in *Raad* reaffirmed its use of the "clearly superior" test, *id.* at 1194, and did not distinguish, or even mention, the Eleventh Circuit's standard.[3] The Court certainly did not suggest that, although the plaintiff in that case satisfied the "clearly superior" test of *Odima*, her qualifications for the teaching position she sought (a graduate degree and "outstanding faculty recommendations" from her state teachers program) would not have satisfied the "no reasonable person, in the exercise of impartial judgment" test of *Cooper*.[4]

Petitioners also cite two unpublished memorandum decisions for the fanciful proposition that the Ninth Circuit allows evidence of *equal* qualifications to be the sole basis for a finding of pretext. For one thing, these unpublished decisions – *Margolis* v. *Tektronix, Inc.*, 44 Fed. App'x 138 (9th Cir. 2002) (*per curiam*), and *Tucevich* v. *Nevada*, No. 97-16713, 1999 WL 62735 (9th Cir. Jan. 22, 1999) (*per curiam*) – do not establish Circuit precedent. See 9th Cir. Local R. 36-3(a). But in any event, in *Tucevich* there were many types of evidence supporting a finding of discrimination, and thus the jury would not have been asked

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[3] The Ninth Circuit expressed discomfort with the use of the "slap you in the face" phrase with which this Court disagreed in *Ash*, *see Raad*, 323 F.3d at 1194, but this *dicta* surely does not create a circuit split, since the Eleventh Circuit no longer uses that aphorism, and the substance of the Ninth Circuit's "clearly superior" test is no different from the Eleventh Circuit's *Cooper* test.

[4] The standards are, in fact, indistinguishable. In *Lee* v. *GTE Florida, Inc.*, 226 F.3d 1249 (11th Cir. 2000), the Eleventh Circuit applied its "no reasonable person, in the exercise of impartial judgment" standard, and concluded that the plaintiff did not meet her burden of proving pretext because her "evidence at the trial fell far short of establishing that she was *clearly more qualified* for the position" than the applicant who was selected. *Id.* at 1254-55 (emphasis added). Thus, the Eleventh Circuit itself has equated its standard with "clearly more qualified," which is identical to "clearly superior."

to find pretext based *solely* on "equal" qualifications.[5] And insofar as *Margolis* suggests that "[a] jury could find . . . a pretext for discrimination if it believes that Margolis was, in fact, more (or at least as) qualified than" the applicant who was hired, 44 Fed. App'x at 142-43, that is plainly an incorrect statement of the Ninth Circuit's standard for finding pretext based solely on qualifications evidence, which requires that the plaintiff's qualifications be "clearly superior." See, *e.g.*, *Raad*, 323 F.3d at 1194; *Odima*, 53 F.3d at 1492. To the extent there is a "conflict" between one of the Ninth Circuit's unpublished, non-precedential memorandum opinions and longstanding Ninth Circuit precedent, that is a matter for the Ninth Circuit to resolve, not this Court.

Nor do petitioners cite precedent from the Sixth Circuit that is contrary to the uniform rule in other circuits. Indeed, they do not cite *at all* the leading Sixth Circuit case, *Bender* v. *Hecht's Department Stores*, 455 F.3d 612 (6th Cir. 2006), in which the Court held squarely that when a plaintiff relies *solely* on qualifications evidence to establish pretext, "the rejected applicant's qualifications must be *so significantly better* than the successful applicant's qualifications that *no reasonable employer would have chosen the latter applicant over the former*." *Id.* at 627 (emphases added).

Instead, petitioners cite yet another unpublished memorandum decision – *Jenkins* v. *Nashville Public Radio*, 106 Fed. App'x 991 (6th Cir. 2004) – that does not establish Sixth Circuit precedent. See 6th Cir. I.O.P. R. 206(c). *Jenkins*, moreover, held merely that the plaintiff's evidence of superior qualifications, combined with other evidence such as irregularities in the application process, was *probative* of pretext, and that the totality of the evidence could have been

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[5] This highlights the second fundamental flaw in petitioners' argument: they conflate the standard for proving pretext based *solely* on qualifications evidence with the standard for relying on such evidence as part of a mosaic of other evidence of discrimination. We address this issue in Section I.B.3.b below.

sufficient *collectively* to permit a jury to return a verdict for the plaintiff. *Jenkins*, 106 Fed. App'x at 994-95. As the Sixth Circuit made clear in the precedential *Bender* opinion (which petitioners ignore), *Jenkins* applies *only* in situations where qualifications evidence is presented as part of an overall tapestry of evidence that, taken as a whole, tends to prove discrimination. *Bender*, 455 F.3d at 626-27.

Petitioners also contend that three courts of appeals – the Third, Fourth, and District of Columbia Circuits – apply an "intermediate" standard. As for the Fourth and District of Columbia Circuits, petitioners simply assert that the standards employed by those Circuits are "more demanding than that in the Ninth Circuit . . . but less demanding than that in the Eleventh and Fifth Circuits," but do not explain why. Pet. at 20. They do not explain how the District of Columbia Circuit's "significantly better qualified" standard, see *Aka*, 156 F.3d at 1294, differs in any meaningful way from the Ninth Circuit's "clearly superior" qualifications standard, see *Odima*, 53 F.3d at 1492, or how either of these standards is substantively different from the Eleventh Circuit's "no reasonable person, in the exercise of impartial judgment" standard, see *Cooper*, 390 F.3d at 732. They also offer no explanation of why the Fourth Circuit's standard ("qualifications were so plainly superior that the employer could not have preferred another candidate," see *Dennis*, 290 F.3d at 648 n.4) is more or less demanding than the tests used by the First, Second, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits.

As for the Third Circuit, it has not addressed this question directly. In *Bray* v. *Marriott Hotels*, 110 F.3d 986 (3d Cir. 1997), the Court held only that the plaintiff could submit evidence of her qualifications to a jury because there were several "evidentiary discrepancies" (gleaned from the Court's consideration of the "totality of the evidence") from which a reasonable jury might conclude that the employer's reasons for not promoting the plaintiff were pretextual – including,

*inter alia*, superior qualifications. *Id.* at 991, 993-97. But the Court did not articulate a standard for cases in which a plaintiff relies *only* on qualifications evidence, and did not contrast this with a situation where several types of probative evidence are offered. Petitioners summarize the case (and then-Judge Alito's dissent), but do not explain how the Third Circuit's decision is inconsistent with any other circuit.

Petitioners do not cite a *single case* in which a circuit conflict is evident, and their attempt to group the circuits along an invented spectrum of supposed restrictiveness is artificial and arbitrary.

b. As the foregoing discussion makes clear, petitioners' artificial categorization of the circuits is flawed for a second fundamental reason: they repeatedly confuse the standards for pretext claims based *solely* on qualifications evidence and pretext claims based on a *variety* of evidence, in which the plaintiff's qualifications are but one part of a mosaic that, as a whole, is evidence of discrimination. As the Sixth Circuit explained in *Bender*,

> [A]cknowledging that evidence of comparative qualifications "may be probative" of pretext is a far cry from holding that such evidence is itself sufficient in all cases to raise a genuine issue of fact of discriminatory motive. . . .
>
> Whether qualifications evidence will be sufficient to raise a question of fact as to pretext will depend on whether a plaintiff presents other evidence of discrimination. In the case in which a plaintiff does provide other probative evidence of discrimination, that evidence, taken together with evidence that the plaintiff was as qualified as or better qualified than the successful applicant, might well result in the plaintiff's claim surviving summary judgment. . . . On the other hand, in the case in which there is little or no other probative

> evidence of discrimination, to survive summary judgment the rejected applicant's qualifications must be so significantly better than the successful applicant's qualifications that no reasonable employer would have chosen the latter applicant over the former.

455 F.3d at 626-27 (citation omitted).

The circuits uniformly require a plaintiff who seeks to establish pretext based *solely* on his superior qualifications to show that his qualifications were *markedly* superior, in keeping with courts' reluctance to second-guess employers' business decisions. But no circuit requires such a showing if qualifications evidence is used, with other evidence, as simply *probative* of discrimination. See, *e.g.*, *Rathbun*, 361 F.3d at 75 (1st Cir.) (explaining that even if a plaintiff's qualifications are not "obviously superior," "a claimed difference in qualifications may [still] be sufficient to ground an action if accompanied by independent evidence"); *Byrnie*, 243 F.3d at 103 (2d Cir.) (same, and explaining that "just because the discrepancy between [the] qualifications does not on its own have the strength to create a material issue of fact, that does not mean the discrepancy is stripped of all probative value"); *Bray*, 110 F.3d at 993-97 (3d Cir.) (same); *Dennis*, 290 F.3d at 648 (4th Cir.) (same); *David* v. *Caterpillar, Inc.*, 324 F.3d 851, 861-62 (7th Cir. 2003) (same); *Bullington*, 186 F.3d at 1319 (10th Cir.) (explaining that "a comparative analysis of job applicants' qualifications may be relevant in proving pretext," but cannot *alone* prove pretext unless "[t]he disparity in qualifications [is] 'overwhelming'"); cf. *Aka*, 156 F.3d at 1295 (D.C. Cir.) (noting that "[a] plaintiff attacking a qualifications-based explanation is of course not limited to comparing his qualifications against those of the successful candidate. The plaintiff can instead seek to expose other flaws in the employer's explanation [which] may suffice to permit a jury to infer that the employer's explanation is incorrect or fabricated, and thus to infer discrimination.").

The Eleventh Circuit is not an exception. See, *e.g.*, *Lee* v. *GTE Fla., Inc.*, 226 F.3d 1249, 1253 (11th Cir. 2000) (explaining that while "a plaintiff cannot prove pretext by *simply showing* that she was better qualified than the individual who received the position that she wanted, . . . evidence showing an employer hired a less qualified applicant over the plaintiff may be *probative* of whether the employer's proffered reason for not promoting the plaintiff was pretextual" (emphases added)). Indeed, in the Eleventh Circuit's first decision in this case, it explained that Ash's and Hithon's evidence of their qualifications was "probative of whether the employer's reasons [were] pretextual," even though it was not alone "proof of pretext." Pet. App. 15a. And the Eleventh Circuit ruled that Hithon was entitled to a new trial *because* he submitted enough probative evidence – *including* his qualifications and the evidence suggesting that Hatley interviewed him after King had already accepted the job – to prove pretext.

Thus, petitioners' comparison of Ninth Circuit cases involving several types of probative evidence (which are subject to a less demanding standard in every circuit) and Eleventh Circuit cases in which plaintiffs sought to prove pretext based on their qualifications alone (which are subject to a more demanding standard in every circuit) does not reflect a circuit split at all. It simply reflects petitioners' failure to recognize a critical legal distinction.[6] This

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[6] Petitioners' misunderstanding is demonstrated further by their argument that the Seventh Circuit applies a "hybrid" standard. They contend, correctly, that the Seventh Circuit uses the same standard as the Eleventh Circuit (and other circuits) "[w]here a plaintiff relies *solely* on evidence of comparative qualifications," and uses a less restrictive standard (which petitioners label the "Ninth Circuit standard") "where the plaintiff has other evidence (albeit evidence not by itself sufficient to support a finding of discrimination)." Pet. at 21-22. *Compare Millbrook*, 280 F.3d at 1179 (7th Cir.) (holding that a plaintiff may prove pretext based solely on qualifications if the "differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of

distinction, moreover, was not fashioned out of whole cloth by the courts of appeals. Rather, it is compelled by this Court's holding in *Burdine*:

> [Title VII] was not intended to "diminish traditional management prerogatives." . . .
>
> The views of the Court of Appeals [pre-*Burdine*] can be read, we think, as requiring the employer to hire the minority or female applicant whenever that person's objective qualifications were equal to those of a white male applicant. *But Title VII does not obligate an employer to accord this preference.* Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. *The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability*, although this may be *probative* of whether the employer's reasons are pretexts for discrimination.

450 U.S. at 259 (emphases added).

Petitioners' failure to grasp this distinction undermines further their "grouping" of the circuits' standards into various artificial categories.

c. Finally, petitioners attempt to prove a circuit split based on the success that individual plaintiffs have had among the circuits. They claim that the circuits' standards,

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impartial judgment that the plaintiff was clearly better qualified"), *with David*, 324 F.3d at 863 (7th Cir.) ("The *Millbrook* standard is controlling in cases in which the plaintiff relies exclusively on evidence of the applicants' comparative qualifications; however, it is not controlling where the plaintiff offers other evidence . . . in addition to the differences in relative qualifications."). Of course, as explained, this rule is not unique to the Seventh Circuit, and the other circuits recognize the same critical distinction.

which are largely identical in language and entirely identical in substance, are nonetheless in "conflict" *because* some plaintiffs have succeeded under those standards while others have failed. From this, petitioners conclude that the standards are different and "outcome determinative." In other words, petitioners identify cases in which a plaintiff has succeeded in one circuit and a different plaintiff (relying on different facts) has failed in another, and, reasoning backward, they conclude that the reason for the different results must be that the legal standards used in those circuits are substantively different. They then make the circular argument that the different standards produce different outcomes.

They claim, for example, that the standards in the Fifth and Eleventh Circuits are "fatal in practice" because petitioners have only identified two cases between those circuits in which plaintiffs have succeeded in establishing pretext based solely on comparative qualifications,[7] whereas the Fourth Circuit (which, as noted, employs a standard expressed in terms that are substantively identical to the Fifth and Eleventh Circuits) is "intermediate." The only reason petitioners give for this distinction is that the Fourth Circuit in *Dennis* upheld a jury's finding of discrimination based on the plaintiff's qualifications evidence. The District of Columbia Circuit, too, is given the "intermediate" label because it overturned a summary judgment award for defendants based on the plaintiff's qualifications evidence in *Aka*. But petitioners do

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[7] Of course, this approach is flawed empirically. It ignores the realities of the court system and presupposes that published opinions represent the entire universe of cases that have involved the issue at hand. Obviously, in those cases where a court has concluded that sufficient qualifications evidence was presented by the plaintiff to survive summary judgment, the result would be the issuance of a non-appealable order. Undoubtedly, there are numerous cases in which courts have found the plaintiff's qualifications evidence to be sufficient but there is no published opinion reflecting that holding because the cases have settled, were tried to verdict without appeal or were otherwise resolved without an appeal or published decision.

not explain why the District of Columbia Circuit's "significantly better qualified" standard is equivalent to the Fourth Circuit's "qualifications so plainly superior that the employer could not have preferred another candidate" standard, but differs from the standards of the Second, Fifth, Sixth, Seventh, and Eleventh Circuits, all of which have adopted language similar to the Fourth Circuit, and substantively identical to the rest. The mere fact that plaintiffs have prevailed in some circuits based on the unique facts in their cases is plainly not evidence that the standards themselves differ.

Similarly, petitioners cite a number of cases from the Ninth Circuit (most of them unpublished and non-precedential), and a few from the Sixth Circuit, in which plaintiffs have purportedly survived a motion for summary judgment. These cases are simply irrelevant, since they either do not involve Title VII, or are yet more examples of cases in which plaintiffs relied on their qualifications as one type of probative evidence, not the only evidence of pretext.[8] But in

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[8] Of the published Ninth Circuit opinions petitioners cite – *Cornwell* v. *Electra Central Credit Union*, 439 F.3d 1018 (9th Cir. 2006), *Godwin* v. *Hunt Wesson, Inc.*, 150 F.3d 1217 (9th Cir. 1998), and *Lindahl* v. *Air France*, 930 F.2d 1434 (9th Cir. 1991) – *none* involved claims that a plaintiff's allegedly superior qualifications were alone sufficient to sustain a finding of pretext. Rather, in all three cases, the Court simply noted that evidence that the plaintiff was qualified for the job was, in conjunction with other evidence of discrimination, *probative* of pretext. *Cornwell*, 439 F.3d at 1033-34; *Godwin*, 150 F.3d at 1222; *Lindahl*, 930 F.3d at 1439.

Petitioners also cite several Sixth Circuit decisions, many of them unpublished and non-precedential. Of the published decisions, *Zambetti* v. *Cuyahoga Community College*, 314 F.3d 249 (6th Cir. 2002), merely held that evidence of superior qualifications was probative of pretext when "coupled with" other evidence, *id.* at 260, and *Glenn's Trucking Co.* v. *N.L.R.B.*, 298 F.3d 502 (6th Cir. 2002), did not even involve Title VII at all, but rather an unfair labor charge under the National Labor Relations Act that only required proof that union applicants were "qualified" for the jobs they sought. *Id.* at 506. And, as noted, petitioners do *not* cite *Bender*, in which the Sixth Circuit held squarely (in keeping with the rule

any event, given the unique factual circumstances of every discrimination case, any hypothetical difference in the number of published opinions among the circuits favoring plaintiffs is not evidence of a circuit split, and surely cannot be relied upon for the tautological argument that supposedly different standards are "outcome determinative."[9]

## II. EVEN IF THERE WERE SUBSTANTIVE DIFFERENCES AMONG THE CIRCUITS, THIS CASE IS AN INAPPROPRIATE VEHICLE FOR ADDRESSING THE ISSUE.

Even if there were substantive differences between the standards for comparative qualifications evidence used in different circuits – and there plainly is not – this case does not present an appropriate occasion for this Court to resolve the issue. Petitioners do not claim that they were more qualified under the criteria that were actually used in this case. Instead, they claim they were more qualified under the standards they believe *should* have been used, which is a claim of pretext

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in other circuits) that a plaintiff who seeks to prove pretext based *solely* on superior qualifications must show that his "qualifications [were] so significantly better than the successful applicant's qualifications that no reasonable employer would have chosen the latter applicant over the former." *Bender*, 455 F.3d at 627.

[9] Petitioners also argue that "the court" decides qualifications in some circuits, while "the trier of fact" decides them in others. *See, e.g.*, Pet. at 18-20. To make this distinction, they cite some cases in which courts have held that sufficient evidence (usually qualifications evidence combined with other evidence) existed to allow a jury to find for the plaintiff, and contrast these to cases in which courts have held that the evidence (usually qualifications evidence standing alone) was insufficient. Such factual differences, especially insofar as petitioners compare two completely different types of standards, do not give rise to a circuit split. Moreover, as explained in greater detail in Section III below, to the extent petitioners argue that the jury should be the *sole* arbiter of whether the evidence is sufficient to support pretext, their argument has been rejected explicitly by this Court, which recognized in *Reeves* that courts *should* grant judgment as a matter of law in cases like this one. *See Reeves*, 530 U.S. at 148-49.

based on the company's alleged deviation from its policies, not a superior qualifications claim.

The evidence of supposedly superior qualifications on which petitioners rely consists primarily of their long service at the Gadsden plant in positions below the level of Shift Manager. Pet. at 5. They do *not* contend that they were more qualified (or even as qualified) under the hiring criteria the decision maker, Mr. Hatley, actually used; in fact, both the District Court and the Court of Appeals concluded that petitioners were clearly *less* qualified under those criteria. See Pet. App. 5a-6a, 32a-33a.

This debate over decisional criteria precludes consideration of the first question petitioners raise in their petition. If Hatley in fact applied his stated criteria, then petitioners were not better qualified, let alone markedly so, and the question of superior qualifications is not presented at all. Conversely, if Hithon can demonstrate on remand that Hatley's claimed reliance on these criteria was actually a pretext *without* proving his qualifications were markedly superior (as the Court of Appeals held), there will be no need to address the relative qualifications of Hithon and the successful applicants, because pretext will already have been shown.

Nor is the question presented in Ash's case. In the proceedings below, it was "Ash's position, and the evidence is uncontroverted, that Hatley did not consider [him] for either shift manager opening." Pet. App. 25a. In the absence of any actual comparison of qualifications by the decision maker, there is simply no occasion in this case for deciding what degree of superiority in qualifications would be sufficient to establish pretext.

## III. THE ELEVENTH CIRCUIT'S EVALUATION OF THE ALLEGEDLY BIASED REMARKS IN THIS CASE WAS PROPER.

Petitioners argue that the Eleventh Circuit, out of some inexplicable "determination to find some reason to again

overturn the jury's finding of discrimination," flouted Supreme Court precedent and ran roughshod over established review standards. The Eleventh Circuit did no such thing.

In *Ash*, this Court instructed the Eleventh Circuit to reconsider its erroneous suggestion that Hatley's three uses of the word "boy" when addressing Ash and Hithon were not evidence of discrimination because they were not accompanied by a racial qualifier, and to decide whether this reasoning was "essential" to the holding. The Eleventh Circuit decided it was not.

In its first decision, the Eleventh Circuit noted explicitly that potentially racial statements could be circumstantial evidence of pretext, see Pet. App. 14a, and acknowledged on remand that the use of the word "boy" when addressing black men "is considered to have general racial implications," *id.* at 5a. But the Court of Appeals held, applying well established standards of review, that the District Court did not err in concluding that, as a matter of law, "the 'boy' comments, with the other evidence presented, do not provide a reasonable basis for a finding of racial discrimination in the context of the employment decisions at issue . . . ." *Id.* at 6a.

Petitioners cite several cases, from this Court and the courts of appeals, for the unremarkable proposition that statements that could be evidence of bias should be interpreted by the trier of fact. See, *e.g.*, *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 577 (1985). But instead of improperly removing the interpretation of the stray remarks in this case from the province of the jury, the courts below performed a function this Court has long recognized as appropriate: based on the totality of the evidence presented at trial, and considering the strength of petitioners' evidence and its probity (based on context), the courts concluded that this evidence of pretext was insufficient, as a matter of law, to overcome the overwhelming evidence at trial that Hatley hired the best candidates for the jobs using reasonable, nondiscriminatory criteria.

As this Court has explained,

> [w]hether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law.
>
> * * *
>
> [A]n employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

*Reeves*, 530 U.S. at 148-49.

Petitioners proposed rule – that the jury should be the *sole* arbiter of whether the evidence is sufficient to prove pretext, and any court that overturns such a finding exceeds its authority – is thus incorrect. Indeed, this Court has stated clearly that courts *should* grant judgment to defendants as a matter of law in circumstances such as these, notwithstanding jury verdicts to the contrary. "To hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review under Rule 50, and we have reiterated that trial courts should not 'treat discrimination differently from other ultimate questions of fact.'" *Reeves*, 530 U.S. at 148 (quoting *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 524 (1993)) (internal quotation marks omitted).

Nonetheless, petitioners persist in arguing that the Eleventh Circuit substituted its findings of fact for the jury's. They allege that the Eleventh Circuit (1) held that the ambiguity of Hatley's "boy" remarks "precludes a trier of fact from relying on [that] evidence"; (2) concluded that the comments had "no racial intent" based solely on the "cold transcript"; (3) deemed the remarks "legally irrelevant" because they were not made in the context of Hatley's employment decision; and (4) held that such comments "can never be probative." Pet. at 24-26. None of this language, however, appears in the Eleventh Circuit's opinion, and the Eleventh Circuit's *actual* holding is very different. Moreover, petitioners' arguments confuse the role of a factfinder with the role of a court addressing a motion for judgment as a matter of law; as this Court made clear in *Reeves*, a court does not intrude impermissibly in the jury's realm by discharging its review function under Federal Rule of Civil Procedure 50.

The Eleventh Circuit held, consistent with *Reeves*, that the District Court did not err in granting Tyson judgment as a matter of law on Ash's claim, because the evidence of racial discrimination in hiring, considered in its context, and though probative to some degree, was simply insufficient as a matter of law to allow a reasonable jury to find in his favor. Hithon, on the other hand, offered sufficient evidence of pretext – the "boy" comments, his qualifications, *and* the evidence suggesting that Hatley interviewed him after filling the position. All of this evidence was probative, and while the first two types of evidence, considered in their context, were not sufficient to satisfy Hithon's burden of proof, when combined with the third they were enough, in the Eleventh Circuit's view, to support a jury verdict in his favor.[10]

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[10] The Eleventh Circuit concluded, however, that there was insufficient evidence to support the jury's award of compensatory and punitive damages, and thus it was appropriate to remand Hithon's case for a new trial rather than simply reinstate the jury's verdict. Petitioners do not challenge this holding in their petition.

Petitioners argue that, regardless, the evidence of their qualifications and Hatley's comments supported their claims and the jury's verdict in their favor should be reinstated. But the fact-bound determination that such evidence in this particular case was insufficient to sustain a finding of discrimination does not warrant review. Petitioners did not, for example, provide any other evidence of racial hostility at the plant,[11] and although petitioners argued that they had an appropriate level of seniority and satisfied the general job description of the Shift Manager position, they did not offer *any* evidence that Hatley's criteria – including experience at other successful plants, lack of association with the many problems at the Gadsden plant, a college degree, and good recommendations – were themselves pretextual. In fact, the evidence presented at trial of the problems with the Gadsden plant overwhelmingly supported Hatley's testimony that he was trying to reverse the plant's downward slide by hiring Shift Managers with the qualifications just described. It was also uncontested that, under those criteria, Ash and Hithon were not qualified for the positions, or at least were less qualified than the successful applicants (one of whom was already a Shift Manager at a successful Tyson plant, the other of whom had been an Assistant Plant Manager at another plant and had a master's degree in management and human relations, and both of whom came very highly recommended by Tyson executives).

In short, the Eleventh Circuit held properly that the District Court did not err in concluding that the totality of the evidence produced at trial was not sufficient to allow a reasonable jury to conclude that Ash satisfied his burden of proving that Hatley's hiring decision was discriminatory, but Hithon did provide sufficient evidence of pretext when his

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[11] For example, petitioners offered no evidence that Hatley ever used racial epithets or made other comments that could be considered discriminatory. (Tr. at 284). Both admitted, moreover, that Hatley was rude in his dealings with all workers, white and black. (Tr. at 151-52).

qualifications and Hatley's comments were considered along with the evidence that Hithon was interviewed after King was hired. To the extent the District Court and Eleventh Circuit concluded that petitioners' evidence related to the "boy" comments was too equivocal to overcome, on its own, the compelling evidence that supported Hatley's hiring decision, there is simply no reason for this Court to review that fact-bound determination.

## CONCLUSION

For the foregoing reasons, respondent requests that this Court deny the petition.

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# In The
# Supreme Court of the United States

ANTHONY ASH and JOHN HITHON,

*Petitioners,*

v.

TYSON FOODS, INC.

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

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TABLE OF CONTENTS


| | Page |
|---|---|
| Argument | 1 |
| I. There Is An Important Inter-Circuit Conflict Regarding The Use of Comparative Qualifications Evidence to Prove Employment Discrimination | 1 |
| A. The Eleventh Circuit, Like The Fifth Circuit, Applies The "No Reasonable Person" Standard to All Attempts to Use Evidence of Comparative Qualifications | 2 |
| B. The "No Reasonable Person" Standard In Practice Bars Use of Comparative Qualifications Evidence | 4 |
| C. The Eleventh and Fifth Circuit Bar To Comparative Qualifications Evidence Conflicts With the Standard in Other Circuits | 6 |
| D. This Case Provides An Appropriate Vehicle for Resolving This Conflict | 7 |
| II. The Court of Appeals Again Decided, As It Did in 2005, That The Plaintiffs May Not Rely on Evidence That They Were Repeatedly Addressed As "Boy" | 8 |
| Conclusion | 10 |

## TABLE OF AUTHORITIES

Page

CASES:

*Anderson v. City of Bessemer City*, 470 U.S. 564 (1985) ..... 7

*Autry v. Nassau County School Bd.*, 2006 WL 1232812 *10 (M.D.Fla. May 8, 2006) ..... 4

*Brooks v. County Commission*, 446 F.3d 1160 (11th Cir. 2006) ..... 4

*Brown v. Marriott International, Inc.*, 2006 WL 2189695 *15 (N.D.Ga. July 31, 2006) ..... 4

*Gorrego v. Public Health Trust of Miami Dade County*, 293 F. Supp. 2d 1274 (S.D.Fla. 2003) ..... 4

*Lee v. GTE Florida, Inc.*, 226 F.3d 1249 (11th Cir. 2000) ..... 4

*Odima v. West Tucson Hotel*, 53 F.3d 1484 (9th Cir. 1995) ..... 6, 7

*Taylor v. Roche*, 2006 WL 2613659 *1 (11th Cir., Sept. 12, 2006) ..... 4

## ARGUMENT

The Brief in Opposition describes the decision of the Eleventh Circuit in terms which – if correct – would demonstrate that review by this Court is not warranted. According to respondent, the court of appeals expressly recognized that both the evidence of comparative qualifications and the "boy" remarks were indeed "probative" of discrimination. (Br. Opp. 8, 28).

This is not, however, an accurate or even plausible account of the decision below. To the contrary, the Eleventh Circuit's 2006 opinion – just like the overturned 2005 opinion – held categorically that neither the differences in qualifications nor the "boy" remarks constituted evidence of discrimination at all. The actions of the court of appeals on remand from this Court's 2006 decision do not reflect the thoughtful judicial reassessment required to comply with the mandate of this Court. Much of the language of the Eleventh Circuit's 2006 opinion was simply copied, largely verbatim, from the brief that had been filed on remand by counsel for the defendant.[1]

### I. THERE IS AN IMPORTANT INTER-CIRCUIT CONFLICT REGARDING THE USE OF COMPARATIVE QUALIFICATIONS EVIDENCE TO PROVE EMPLOYMENT DISCRIMINATION

Respondent does not contend that the opinion below actually contains any language stating the comparative qualifications evidence is "probative." Rather, respondent insists that the court of appeals was tacitly applying well-established Eleventh Circuit caselaw that proof of superior qualifications *is* generally probative of discrimination, although only sufficient without more to prove discrimination if the "no reasonable person" requirement is met. Respondent, however, cannot find any Eleventh Circuit

[1] We set forth a comparison of the opinion and brief in an Appendix to this brief. The Eleventh Circuit's opinion reproduces even the typographical and grammatical errors contained in the earlier brief.

decision announcing such a two-part rule. Indeed, over the forty-one years since the enactment of Title VII, respondent is unable to identify so much as a single Eleventh Circuit decision which has ever permitted a plaintiff to rely on qualifications evidence to prove discrimination.

### A. The Eleventh Circuit, Like The Fifth Circuit, Applies The "No Reasonable Person" Standard to All Attempts to Use Evidence of Comparative Qualifications

Eleventh Circuit caselaw, the Brief in Opposition asserts, carefully limits the "no reasonable person" standard to cases in which a plaintiff relies *solely* on comparative qualifications evidence. In all other cases, respondent insists, the Eleventh Circuit has a second, different, and "less demanding" standard. (Br. Opp. 25).[2] The existence of two such separate standards, the Brief in Opposition asserts, is a "critical legal distinction"; any analysis which fails to recognize that obvious distinction would be "flawed" and "confuse[d]." (Br. Opp. 14, 18, 20, 21 n.6).

But in the court of appeals respondent (correctly) insisted, to the contrary, that Eleventh Circuit caselaw recognizes only a single standard – the "no reasonable person" – applicable to all efforts to use comparative qualifications evidence. The "critical legal distinction" now trumpeted in the Brief in Opposition was never mentioned in respondent's brief on remand. Instead, respondent argued in the court of appeals that Eleventh Circuit caselaw applies the "no reasonable person" standard even to cases in which a plaintiff has also proffered other evidence of discrimination. Four earlier Eleventh Circuit cases, respondent argued, established the controlling standard.

> In these cases, comparative qualifications *and other alleged indicia of discrimination* . . . were

[2] Respondent at no point contends that the Fifth Circuit, which also utilizes the "no reasonable person" standard, limits its use in this manner.

> held insufficient on the grounds that there was no showing a reasonable person could not have decided that the qualifications of the selected person or persons warranted the decision.

(Brief on Behalf of Tyson Foods, Inc., *Ash v. Tyson Foods, Inc.*, No. 04-11695-AA (11th Cir.)).

The court of appeals accepted respondent's contention that the Eleventh Circuit's "no reasonable person" standard applies to all efforts to rely on comparative qualifications evidence. The opinion cited the same four Eleventh Circuit cases as exemplifying the "no reasonable person" standard, and explained that

> [i]n these cases, comparative qualifications *and other alleged indicia of discrimination* . . . were held insufficient for a factfinder reasonably to find that the decision was not based on the qualifications of the applicants.

(Pet. App. 7a) (emphasis added). In short, the panel made clear that the "no reasonable person" standard had been routinely and properly applied in cases where there *was* other evidence of discrimination.

Had the "no reasonable person" rule been limited by the Eleventh Circuit to cases in which a plaintiff relies *solely* on comparative qualifications evidence, that rule simply would not have been applicable to the instant case. Respondent acknowledges that the "boy" remarks were also evidence of discrimination (Br. Opp. 25-30), and the court of appeals agreed that the company's violations of its own promotion standards also constituted such evidence. (Pet. App. 14a-15a). Yet it was the "no reasonable person" standard, and only that standard, which the court of appeals applied in rejecting the comparative qualifications evidence. (Pet. App. 7a). Precisely because this case does involve such other evidence of discrimination, respondent was only able to invoke the "no reasonable person" rule in the court of appeals by insisting that the rule is *not* limited to cases in which a plaintiff relies solely on qualifications evidence.

The application of the "no reasonable person" rule to this case, despite the existence of other evidence of

discrimination, was entirely consistent with the well-established understanding of the "no reasonable person" standard in the Eleventh Circuit. The Eleventh Circuit insists, without limitation, that "[i]n the context of a promotion, '[a] plaintiff must show . . . that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff.'" *Taylor v. Roche*, 2006 WL 2613659 *1 (11th Cir. Sept. 12, 2006) (*quoting Brooks v. County Commission*, 446 F.3d 1160, 1163 (11th Cir. 2006). Both the court of appeals and district courts in the Eleventh Circuit have repeatedly applied the "no reasonable person" standard in cases in which the plaintiff had adduced other proof of discrimination.[3]

If, as respondent suggests, the Eleventh Circuit's "no reasonable person" standard were limited to cases in which a plaintiff has no other evidence, there certainly would also be in that circuit a separate line of decisions announcing and applying a distinct (presumably less demanding) standard for the common cases in which the plaintiff does have other evidence. Respondent, however, cannot identify a single appellate or district court decision in the Eleventh Circuit which has ever adopted or applied any such alternative standard for the cases in which a plaintiff does have other evidence.

### B. The "No Reasonable Person" Standard In Practice Bars Use of Comparative Qualifications Evidence

Within the Eleventh Circuit, every known application of the "no reasonable person" standard has concluded that

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[3] *E.g., Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1255 n.2 (11th Cir. 2000) (evidence that the promotion standard was changed to favor the male applicant); *Gorrego v. Public Health Trust of Miami Dade County*, 293 F. Supp. 2d 1274, 1284-85 (S.D.Fla. 2003) ("anti-Hispanic slurs and derogatory remarks"); *Autry v. Nassau County School Bd.*, 2006 WL 1232812 *10 (M.D.Fla. May 8, 2006) ("blacks are lazy"); *Brown v. Marriott International, Inc.*, 2006 WL 2189695 *15 (N.D.Ga. July 31, 2006) ("deviation from the normal hiring procedure").

that standard had not been satisfied. If ever there has been a standard which, although strict in theory, is palpably fatal in practice, this is that case.

The petition reviewed all 27 appellate decisions over a six year period applying the "no reasonable person" standard – in the Eleventh and other circuits – and demonstrated that every one of those decisions, without exception, had held that the plaintiff's evidence could not meet that standard. Respondent does not dispute our characterization of these cases or contend that the petition omitted any contrary appellate decisions.

The petition also explained that the district courts in the Eleventh Circuit in every one of the 28 decisions applying the "no reasonable person" standard have held that the plaintiff's evidence was not sufficient to meet that standard.[4] Respondent asserts that "[u]ndoubtedly, there are numerous cases in which courts have found the plaintiff's qualifications evidence to be sufficient." (Br. Opp. 22 n.7). But respondent's distinguished counsel in a thoroughly researched Brief in Opposition could not find a single example of these supposed "numerous cases." Respondent objects that a district court decision finding that evidence indeed met the "no reasonable person" standard would be "a non-appealable order." (*Id.*) But Westlaw and Federal Supplement routinely publish large numbers of non-appealable orders; both have published non-appealable district court decisions from outside the Eleventh circuit which relied on the existence of comparative qualifications evidence to deny summary judgment.[5]

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[4] Petition, p. 14.

[5] Examples of such published district court decisions are set out in the Reply Brief for Petitioners, *Ash v. Tyson Foods, Inc.*, No. 05-379, pp. 2-3 n.3.

### C. The Eleventh and Fifth Circuit Bar To Comparative Qualifications Evidence Conflicts With the Standard In Other Circuits

Once the actual rule in the Eleventh and Fifth Circuits is evident, the inter-circuit conflict is manifest.

In the Seventh and Sixth Circuits, unlike the Eleventh and Fifth, the "no reasonable person" rule *is* expressly limited to cases in which a plaintiff relies solely on qualifications evidence. Thus in the Seventh and Sixth Circuits, unlike the Eleventh and Fifth Circuits, there are appellate decisions which rely on qualifications evidence in sustaining discrimination claims.

In most other circuits there is (as in the Eleventh and Fifth Circuits) only a single standard applicable to all uses of qualifications evidence. Respondent does not identify any decision in the Third, Fourth, Eighth, Ninth, Tenth or District of Columbia Circuits which draws any distinction between the standard applicable in those circuits to cases in which a plaintiff does, and does not, have other evidence of discrimination. In all of these circuits – unlike the Eleventh and Fifth Circuits – there are appellate decisions upholding the plaintiff's reliance on qualifications evidence. Respondent objects that these appellate decisions were "based on the unique facts in their cases." (Br. Opp. 23). That might have been a plausible argument five years ago, before it became painfully clear that there are no facts sufficient to satisfy the Eleventh or Fifth Circuits. All appellate cases are to some degree unique, but surely appeals involving credible comparative qualifications evidence are not filed only outside the Eleventh and Fifth Circuits.

Respondent's characterization of the Ninth Circuit standard is particularly unpersuasive. Respondent asserts that "[i]n the Ninth Circuit, the 'plaintiff's qualifications [must be] *clearly superior* to the qualifications of the applicant selected.' *Odima v. West Tucson Hotel*, 53 F.3d 1484, 1492 (9th Cir. 1995)." (Br. Opp. 13) (emphasis and bracketed material in brief). The sentence from *Odima* quoted by respondent, however, is actually a description of a district court finding of fact that the qualifications of a

particular plaintiff were clearly superior. By changing the verb in this sentence from "were" to "must be," respondent improperly converts a description into a requirement. To bring this asserted clear superiority requirement into line with its description of the Eleventh Circuit standard, respondent also insists that the *Odima* "clearly superior" rule is limited to cases in which a plaintiff relies "solely on his qualifications" to prove discrimination. (Br. Opp. 14). But *Odima* (which in fact established no such requirement) clearly *did* involve other evidence which "support[ed] the district court's finding of discrimination." 53 F.3d at 1491.

### D. This Case Provides An Appropriate Vehicle for Resolving This Conflict

Petitioners adduced evidence of their superior qualifications for the purpose of demonstrating that the reasons given for the disputed promotion decisions were pretextual. The employer asserted that the criterion it had used in making those promotions was a preference for supervisors with work experience outside the Gadsden plant. The central question at trial was whether that criterion had been selected in place of the company's regular promotion standards precisely because a non-Gadsden-experience criterion would disfavor the two most eligible black candidates, Ash and Hithon. Whether Hithon and Ash were indeed the best qualified candidates under Tyson's regular standards was thus important evidence in determining whether the decision to instead use the non-Gadsden-experience standard was pretextual. Evidence of comparative qualifications was utilized in a similar manner to demonstrate pretext in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).[6]

In its 2004 brief in the court of appeals, respondent insisted that this use of evidence regarding the superior

[6] See Reply Brief for Petitioners, *Ash v. Tyson Foods, Inc.*, No. 05-379, pp. 8-9.

qualifications of Ash and Hithon was a classic example of qualifications evidence, and thus was governed and barred by the "slap in the face" rule.[7] Then, in response to the 2005 certiorari petition, respondent took the opposite position, insisting that this case did not involve comparative qualifications, and that the case therefore was not an appropriate vehicle for ruling on the "slap in the face" rule.[8] On remand to the Eleventh Circuit, respondent changed position yet again, asserting in May 2006 that the instant case is indeed a comparative qualifications case, and thus is controlled by the fatal "no reasonable person" standard.[9] Having prevailed on that argument on remand, respondent now disavows it, and in this Court instead insists that this litigation does not involve comparative qualifications and that the "no reasonable person" standard for such cases was never applicable in the first place. For the reasons set forth above, the position which respondent took in the court of appeals in 2004 and again in 2006 was the correct one.

## II. THE COURT OF APPEALS AGAIN DECIDED, AS IT HAD IN 2005, THAT THE PLAINTIFFS MAY NOT RELY ON EVIDENCE THAT THEY WERE REPEATEDLY ADDRESSED AS "BOY"

We explained in the petition that the court of appeals, in rejecting evidence that Ash and Hithon were repeatedly addressed as "boy," relied on a series of holdings that were inconsistent with the decisions of this Court and numerous circuits. Respondent does not assert this evidence was rejected for a different, more defensible reason. Rather, respondent contends that the Eleventh Circuit actually

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[7] Brief of Appellee Tyson Foods, Inc., *Ash v. Tyson Foods, Inc.*, No. 04-11695-AA (11th Cir.), pp. 49-50 (Sept. 15, 2004).

[8] Opposition to Petition for a Writ of Certiorari, *Ash v. Tyson Foods, Inc.*, No. 05-379, p. 16.

[9] Brief on Behalf of Tyson Foods, Inc., *Ash v. Tyson Foods, Inc.*, No. 04-11695-AA (11th Cir.), pp. 2-15 (May 4, 2006).

held the "boy" remarks were "probative" of discrimination. (Br. Opp. 28). That simply is not what occurred in the court of appeals.

Respondent asserts that the Eleventh Circuit

> acknowledged on remand that the use of the word "boy" when addressing black men "is considered to have general racial implications," [Pet. App.] at 5a.

(Br. Opp. 26). Respondent suggests that the Eleventh Circuit in 2006 concluded that the use of that word in this case indeed had such racial implications.

But the actual 2006 holding is precisely the opposite. The Eleventh Circuit in fact insisted the "boy" remarks in this case were non-racial, and declined to hold that "boy" generally has racial implications.

> The lack of modifier ["black"] in the context of the use of the word "boy" in this case was not essential to the finding that *it was not used racially*, or in such context as to evidence racial bias, in the decisions at issue, even *if* "boy" is considered to have general racial implications.

(Pet. App. 5a) (emphasis and bracketed material added). Respondent omits the first forty-five words of this sentence, including the critical term "if."

Respondent contends the Eleventh Circuit concluded that the "boy" remarks, although probative, were not strong enough to overcome Tyson's exculpatory evidence. The court of appeals is described as holding that

> [t]he District Court did not, therefore, err in concluding that the alleged remarks were "insufficient evidence of bias in the circumstances of this case to overcome the articulated reasons for Hatley's decision." [Pet. App. 5a]

(Br. Opp. 8). The actual passage in the court of appeals opinion has a very different meaning. That passage occurs in a separate paragraph, following the holding that the "boy" remarks were "not used racially." In that context the Eleventh Circuit commented:

> There was insufficient evidence of bias in the circumstances of this case to overcome the articulated reasons for Hatley's decision.

(Pet. App. 5a). The subject of this sentence is not the "boy" remarks, but the other evidence in the case. "Insufficient evidence" is a characterization of what little evidence remained in the case *after* the "boy" remarks and comparative qualification evidence were disregarded. And there is no reference to the District Court having concluded the "boy" remarks were probative but weak evidence; the District Court had in fact rejected that evidence entirely because the judge personally believed that the remarks were not made with a racial purpose. (Pet. App. 34a).

## CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

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## Comparison of the Eleventh Circuit August 2, 2006, Opinion and the Defendant's May 4, 2006 Brief in the Court of Appeals[1]

Statements Regarding the "Boy" Remarks

(1) *Eleventh Circuit Opinion*:

"The usages were conversational and as found by the district court were non-racial in context." (Pet. App. 5a)

*Defendant's Eleventh Circuit Brief*:

"The usages were conversational and as found by the trial court were non-racial in context and 'not racial in nature.'"

(Brief on Behalf of Tyson Foods, Inc., pp. 7-8)

(2) *Eleventh Circuit Opinion*:

"But even if somehow construed as racial, we conclude that the comments were ambiguous stray remarks not uttered in the context of the decisions at issue and are not sufficient circumstantial evidence of bias to provide a reasonable basis for a finding of racial discrimination in the denial of the promotions." (Pet. App. 5a)

*Defendant's Eleventh Circuit Brief*:

"Even if somehow construed as racial in nature, the comments were ambiguous stray remarks not uttered in the context of the decisions at issue and are not sufficient circumstantial evidence of bias to prove pretext."

(Brief on Behalf of Tyson Foods, Inc., p. 8)

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[1] Brief on Behalf of Tyson Foods, Inc., *Ash v. Tyson Foods, Inc.*, No. 04-11695-AA (11th Cir.).

(3) *Eleventh Circuit Opinion*:

"The lack of a modifier in the context of the use of the word 'boy' in this case was not essential to the finding that it was not used racially, or in such a context as to evidence racial bias, in the decisions at issue, even if 'boy' is considered to have general racial implications." (Pet. App. 5a)

*Defendant's Eleventh Circuit Brief*:

"The lack of a modifier in the context of the use of the word 'boy' in this case was not essential to the finding that it was not used racially, or in such a context as to evidence racial bias, in the decisions at issue, even if 'boy' is considered to have general racial implications."

(Brief on Behalf of Tyson Foods, Inc., p. 8)

(4) *Eleventh Circuit Opinion*:

"The statements were remote in time to the employment decision, totally unrelated to the promotions at issue, and showed no indication of general racial bias in the decision making process at the plant or by Hatley." (Pet. App. 5a).

*Defendant's Eleventh Circuit Brief*:

"The statements were remote in time to the decision, totally unrelated to the promotions at issue and showed no indication of general racial bias in the decision-making process at the plant or by Hatley."

(Brief on Behalf of Tyson Foods, Inc., p. 12)

(5) *Eleventh Circuit Opinion*:

"The Supreme Court held that the word 'boy' used without modification was 'not always benign' and could be evidence of racially discriminatory intent." (Pet. App. 4a)

*Defendant's Eleventh Circuit Brief*:

"The Supreme Court held that the word 'boy' used without modification was 'not always benign' and could be racial or racially abusive."

(Brief on Behalf of Tyson Foods, Inc., p. 9)

(6) *Eleventh Circuit Opinion*:

"The Court listed five non-exclusive factors which may indicate whether the word is evidence of racial animus – 'context, inflection, tone of voice, local custom and historical usage.' *Ash*, 126 Sup. Ct. at 1197." (Pet. App. 4a-5a)

*Defendant's Eleventh Circuit Brief*:

"The court suggested five factors which might be considered in determining whether the speaker intended his or her use of 'boy' to be racially abusive – 'context, inflection, tone of voice, local custom and historical usage.' 126 Sup. Ct. at 1197."

(Brief on Behalf of Tyson Foods, Inc., pp. 9-10)[2]

Statements Regarding Comparative Qualifications

(7) *Eleventh Circuit Opinion*:

"The 'jump off the page test' was not essential to this court's initial conclusion that the comparative qualifications evidence did not provide sufficient evidence of pretext." (Pet. App. 6a)

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[2] Both the brief and the subsequent opinion mistakenly omit the comma that is found in this Court's opinion in *Ash* after the word "custom." See 126 Sup. Ct. at 1197.

*Defendant's Eleventh Circuit Brief*:

"The 'jump off the page test' was not essential to this Court's initial conclusion that the comparative qualifications evidence was insufficient to provide proof of pretext."

(Brief on Behalf of Tyson Foods, Inc., p. 14)

(8) *Eleventh Circuit Opinion*:

"Since *Ash*, we have utilized the *Cooper* standard to evaluate the level of disparity necessary to constitute proof of pretext claimed on the basis of comparative qualifications. *See, e.g., Brooks v. County Commission of Jefferson County, Al*, 446 F.3d 1160 (11th Cir., 2006); *Watkins v. City of Huntsville*, (No. 04-15607)(11th Cir. Apr. 18, 2006); *Roper v. City of Foley Police Dept.*, (No. 05-15199)(11th Cir. Apr. 18, 2006); *Price v. M & H Valve Co.*, (No. 05-15205)(11th Cir. Apr. 7, 2006)." (Pet. App. 6a-7a)

*Defendant's Eleventh Circuit Brief*:

"Since *Ash*, this Court has utilized the *Cooper* standard to evaluate the level of disparity necessary to be proof of pretext claimed on the basis of comparative qualifications and has not yet held pretext to be shown by such an analysis. *Brooks v. County Commission of Jefferson County, Al.*, 2006 U.S.App. LEXIS 9636; *Watkins v. City of Huntsville*, 2006 U.S.App. LEXIS 9703 (11th Cir. 2006); *Roper v. City of Foley Police Dept.*, 2006 U.S.App. LEXIS 9624 (11th Cir. 2006); *Price v. M & H Valve Co.*, 2006 U.S.App. LEXIS 8415 (11th Cir. 2006)."

(Brief on Behalf of Tyson Foods, Inc., pp. 14-15)

(9) *Eleventh Circuit Opinion*:

"In these cases, comparative qualifications and other alleged indicia of discrimination (i.e., subjective criteria used by the decision-maker, plaintiff's belief that his (or her) qualifications were superior), were held insufficient for a factfinder reasonably to find that the decision was not based on the qualifications of the applicants." (Pet. App. 7a)

*Defendant's Eleventh Circuit Brief*:

"In these cases, comparative qualifications and other alleged indicia of discrimination (i.e. subjective criteria used by the decision-maker, plaintiff's belief that his (or her) qualifications were superior), were held insufficient on grounds that there was no showing a reasonable person could not have decided that the qualifications of the selected person or persons warranted the decision."

(Brief on Behalf of Tyson Foods, Inc., p. 15)[3]

(10) *Eleventh Circuit Opinion*:

"In its opinion vacating our judgment, the Supreme Court instructed that the visual image of words 'jumping off the page to slap you in the face' was unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications." (Pet. App. 6a)

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[3] The brief mistakenly includes a stray comma (before the word "were") between the subject and verb in this sentence. The subsequent opinion reproduces the identical grammatical error.

*Defendant's Eleventh Circuit Brief*:

"The Supreme Court instructed that the 'visual image of words jumping off the page to slap you in the face' was unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications. . . ."

(Brief on Behalf of Tyson Foods, Inc., p. 14)

(11) *Eleventh Circuit Opinion*:

"The Court concluded that 'some formulation other than the test . . . articulated . . . by those words would better insure that the trial courts reach consistent results,' citing by way of contrast the articulated standard used in *Cooper v. Southern Co.*, 390 F. 3d 695, 732 (11th Cir. 2004), *cert. denied*, __ U.S. __, 126 Sup. Ct. 478 (2005), to-wit: 'disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.' *Ash*, 126 Sup. Ct. at 1197." (Pet. App. 6a)

*Defendant's Eleventh Circuit Brief*:

"[The Court] concluded that 'some other formulation other than the test . . . articulated . . . by those words would better ensure that the trial courts reach consistent results,' citing with approval the articulated standard used in *Cooper v. Southern Co.*, 390 f. 3d at 732, to wit: 'disparities in qualifications must be of such weight and significance that no reasonable person in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.' *Ash id.* at 1197."

(Brief on Behalf of Tyson Foods, Inc., p. 14)

General Conclusion

(12) *Eleventh Circuit Opinion*:

"There was insufficient evidence of bias in the circumstances of this case to overcome the articulated reasons for Hatley's decision, which was that the selected applicants were not associated with the prior poor performance of the plant, they had demonstrated leadership and management skills, they had superior recommendations, and they had experience in the poultry industry at more than one Tyson plant." (Pet. App. 5a-6a)

*Defendant's Eleventh Circuit Brief*:

"There was no other evidence of bias in the circumstances of this case so as to overcome the articulated reasons for Hatley's decision, which was that the selected applicants were not associated with the prior poor performance at the plant, they had demonstrated leadership and management skills, they had superior recommendations and they had experience in the poultry industry at more than one Tyson plant."

(Brief on Behalf of Tyson Foods, Inc., p. 12)

(13) *Eleventh Circuit Opinion*:

"The only negative – King's lack of a college degree – made him equally, but not less, qualified than the plaintiffs." (Pet. App. 6a)

*Defendant's Eleventh Circuit Brief*:

"The only negative – King's lack of a college degree – made him equally but not less qualified educationally than the undegreed plaintiffs."

(Brief on Behalf of Tyson Foods, Inc., p. 12)